

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 101

UNITED STATES, APPELLANT,

vs.

WARD BAKING CO., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA

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Original Print

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the Southern District of Florida

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(File endorsement omitted)

1
IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 4735-Civ-J

UNITED STATES OF AMERICA, *Plaintiff,*

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY,
DERST BAKING COMPANY, FLOWERS BAKING COMPANY,
INC. and SOUTHERN BAKERIES COMPANY, *Defendants.*

Complaint—Filed July 21, 1961

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the hereinafter named defendants in two counts, and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted against the defendants, under the False Claims Act (31 U.S.C. §§ 231-233) by the United States of America in its capacity as purchaser of bakery products for use by United States Naval installations, for forfeitures, and, in addition, double the amount of damages suffered by it due to defendants' acts (Count I), and, under Section 4 of the Act of Congress of July 2, 1890 (c. 647, 26 Stat. 209 as amended), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, to prevent and restrain continuing violations by the defendants as hereinafter alleged of Section 1 of said Act (15 U.S.C. § 1) (Count II).

2. Inasmuch as all defendants are corporations, no defendant is in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States.

3. All the defendants; except Derst Baking Company, maintain offices, transact business and are found within the Southern District of Florida.

II

DEFINITION OF TERMS

4. As used in this complaint:

(a) "Bakery products" means bread and rolls.

(b) "Jacksonville area" means the area within (1) the northern part of the State of Florida, and (2) the southeastern part of the State of Georgia.

III

THE DEFENDANTS

5. Ward Baking Company (hereinafter called "Ward") is made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, New York. It owns and operates baking plants in Jacksonville, Florida and various other States.

6. American Bakeries Company (hereinafter called "American") is made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Chicago, Illinois. It owns and operates baking plants in Jacksonville, Florida and various other States.

7. Derst Baking Company (hereinafter called "Derst") is made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Savannah, Georgia. It owns and operates a baking plant in Savannah, Georgia.

8. Flowers Baking Company, Inc. (hereinafter called "Flowers") is made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Thomasville, Georgia. It owns and operates a

baking plant in Jacksonville, Florida, and a baking plant in Thomasville, Georgia.

9. Southern Bakeries Company (hereinafter called "Southern") is made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Atlanta, Georgia. It owns and operates baking plants in Jacksonville, Florida and various other States.

10. The acts alleged in this complaint to have been done by each of the defendants were authorized, ordered, or done by the officers, agents, employees, or representatives of each defendant while actively engaged in the management, direction, or control of its affairs.

11. During the period covered by this complaint the United States of America, through its Naval installations in the Jacksonville area, purchased bakery products for use by said installations. All during said period, plaintiff purchased bakery products pursuant to sealed, competitive bidding procedures; and in accordance with this practice, and for the purpose of letting contracts, it called for bids from suppliers, including defendants, for supplying bakery products to plaintiff. Bakery products were purchased by plaintiff during the aforesaid period pursuant to contracts awarded in response to such bidding procedures, and all purchases of bakery products complained of herein were from defendants.

IV

OFFENSES CHARGED

COUNT I

12. The United States of America, in its capacity as purchaser of bakery products for use by United States Naval installations in the Jacksonville area, brings this suit under Sections 3491 and 3492 of the Revised Statutes (31 U.S.C. §§ 232-233), to recover forfeitures and damages provided by Section 3490 and 5438 of the Revised Statutes (31 U.S.C. § 231), commonly known as the False Claims Act.

4

13. Beginning at least as early as 1957, the exact date to plaintiff unknown, the defendants, together with others to plaintiff unknown, knowingly combined, conspired and agreed to defraud and injure the United States of America by obtaining or aiding to obtain the payment or allowance of false, fraudulent or fictitious claims under contracts awarded them for the sale of bakery products and did make, cause to be made, or presented or caused to be presented, for payment or approval, such false claims during said period.

14. In furtherance of said combination and conspiracy, defendants unlawfully agreed, among other things:

(a) To allocate among themselves the business of supplying bakery products to United States Naval installations in the Jacksonville area; and

(b) To submit noncompetitive, collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area.

15. During the period of time covered by this complaint, the defendants, and others to plaintiff unknown, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, the following:

(a) Representatives of the defendants held meetings and conferred by telephone for the purpose of allocating among the defendants the business of supplying bakery products to United States Naval installations in the Jacksonville area. The business was

5 allocated in such a manner as to provide each defendant with the business for a designated quarterly period of the year. When invitations to bid were received from the Naval installations in the Jacksonville area, said representatives would again meet and confer and the representatives of the defendant designated for the particular period would declare the prices which that defendant intended to bid. The others would agree to bid higher prices and thus protect the bid of the designated low bidder.

(b) Throughout the period covered by this complaint, the defendants submitted bids on bakery products to United States Naval installations in the Jacksonville area, which had no knowledge of the combination and conspiracy hereinabove alleged, and pursuant to such bids, defendants were awarded contracts to supply bakery products to said Naval installations.

16. Pursuant to said combination and conspiracy, and as a result of the acts done in furtherance thereof, defendants have been awarded contracts for the sale of bakery products to said Naval installations and have received payments thereunder, on the basis of the bids which they submitted and which they had falsely or fraudulently represented to be bona fide, independent and competitive, and not the product of any collusion or agreement between the bidders, and the prices of which bids they further had falsely or fraudulently represented to be competitive; whereas in fact known to defendants but unknown to plaintiff, said bids submitted were sham and collusive and not the result of open competition, and prices therefor were arbitrary and noncompetitive.

17. With respect to each such contract awarded for the supply of bakery products during the aforesaid period of the conspiracy, the defendant to which such contract was awarded presented and caused to be presented to plaintiff for payment or approval by it numerous claims, knowing such claims to be false or fraudulent in that each was based on a contract which had been falsely and fraudulently procured by reason of the aforesaid bidding practices.

18. As a result of the presentment to it of the aforesaid false or fraudulent claims, and without knowledge thereof, plaintiff has paid the false or fraudulent claims to defendants.

19. As a result of the illegal combination and conspiracy and the defendants' acts in furtherance thereof, plaintiff has been compelled to pay higher prices for bakery products than would have been the case but for the illegal conduct complained of herein, and plaintiff has been financi-

ally damaged by defendants, the amount of which is presently undetermined.

WHEREFORE, plaintiff:

- (a) Demands judgment against each defendant for forfeitures and, in addition, double the amount of the damages it has sustained, together with the costs of suit as provided in Sections 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233).
- (b) Prays that it recover such other amounts and have such other and further relief as the Court shall deem just.

COUNT II

20. The United States of America brings this suit against the defendants under Section 4 of the Act of Congress of July 2, 1890 (c. 647, 26 Stat. 209, as amended), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants as hereinafter alleged of Section 1 of said Act (15 U.S.C. § 1).

21. The defendants operate the largest bakeries in the Jacksonville area and, during the period covered by this complaint, said defendants baked a substantial amount of the bakery products sold in said area. In 1959 total sales by the defendants of bakery products in the Jacksonville area amounted to approximately \$11,000,000.

22. During the period of time covered by this complaint, each of the defendants operated a baking plant in the Jacksonville area. The defendants Ward, American and Southern owned and/or operated trucks which regularly and frequently delivered bread from their bakeries in Jacksonville, Florida to wholesale accounts, including United States Naval installations, located in the State of Georgia. Thus, there was a regular, continuous and substantial flow of bakery products in interstate commerce between the bakeries of the defendants Ward, American and Southern in Jacksonville, Florida and their wholesale accounts and United States Naval installations located in Georgia.

23. Beginning in or about the year 1957, the exact date to plaintiff unknown, defendants, together with others unknown, have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in the sale of bakery products, in violation of Section 1 of the Sherman Act.

8 24. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and other persons to the plaintiff unknown, the substantial terms of which were:

(a) To allocate among themselves the business of supplying bakery products to United States Naval installations in the Jacksonville area; and

(b) To submit noncompetitive, collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area.

25. During the period of time covered by this complaint, the defendants and other persons to plaintiff unknown, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15(a) of Count I hereof, the allegations of which are realleged in this paragraph, with like effect as if herein fully repeated.

26. The effects of the aforesaid combination and conspiracy were that:

(a) Competition among the defendants in the sale and distribution of bakery products to United States Naval installations in the Jacksonville area has been suppressed and eliminated, and

(b) United States Naval installations in the Jacksonville area engaged in the purchase of bakery products have been denied the right to receive competitive sealed bids as required by law and have been forced to pay artificially-fixed prices for bakery products.

9 27. Since at least 1957, plaintiff has purchased substantial quantities of bakery products from defendants for use at United States Naval installations in the Jacksonville area. In purchasing said bakery products, plaintiff, in most instances has invited formal, sealed, competitive bids from prospective suppliers, and, with minor exceptions, has accepted the price offered by the lowest responsible bidder.

28. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids solicited by it during the period covered by this complaint, at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the benefit of competition in prices for bakery products. By the operation of defendants' agreements and concert of action herein alleged, plaintiff has been compelled to pay higher prices than would have been the case but for the violations of the antitrust laws herein alleged.

WHEREFORE, plaintiff prays:

(a) That the aforesaid combination and conspiracy agreements and arrangements be adjudged by the Court to be in unreasonable restraint of the trade and commerce described in this complaint and in violation of Section 1 of the Sherman Act; and that the Court adjudge and decree that the defendants have combined and conspired to restrain interstate trade and commerce in violation of Section 1 of the Sherman Act.

10 (b) That the defendants be enjoined from (1) allocating among themselves the business of supplying bakery products to United States Naval installations in the Jacksonville area and (2) from submitting non-competitive collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area.

(c) That the plaintiff have such further, general, and different relief as the nature of the case may require and the Court may deem appropriate in the premises.

(d) That the plaintiff recover its taxable costs.

/s/ HENRY M. STUCKEY

Attorney, Department of Justice

/s/ ROBERT F. KENNEDY

Attorney General

/s/ LEE LOEVINGER

Assistant Attorney General

/s/ MARGARET H. BRASS

Attorney, Department of Justice

/s/ DONALD C. LEHMAN

Ass't. United States Attorney

(File endorsement omitted)

19.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 4735-Civ.-J.

(Title omitted)

**Answer of Defendant Southern Bakeries Company—
Filed October 11, 1961**

Comes now defendant SOUTHERN BAKERIES COMPANY, by its attorneys duly authorized, and files this its answer to plaintiff's Complaint and respectfully shows:

FIRST DEFENSE

1.

Defendant Southern Bakeries Company moves the Court to dismiss Count I and Count II of the plaintiff's Complaint because the same fails to state a claim against this defendant upon which relief can be granted.

SECOND DEFENSE

2.

In criminal proceeding #11,677-Cr.-J. in this Honorable Court this defendant was charged with the identical offense which the plaintiff is herein charging again against this defendant and plaintiff is now seeking another forfeiture in Count I of the present Complaint; and this defendant shows that in said former criminal proceedings it did enter before this Honorable Court a plea of nolo contendere, neither admitting nor denying the charges but not contesting the same, without putting the plaintiff and this defendant to the expense of protracted litigation; and that this defendant through the action of this Court had a fine of \$5,000 levied against it to be forfeited in favor of the plaintiff, and that this defendant did, pursuant to said judgment of this Court of April 11, 1961, pay said fine of \$5,000 in full to the plaintiff. By this present proceeding involving the same parties, and involving the same offenses, this defendant is being put in double jeopardy and Count I of plaintiff's Complaint should abate as plaintiff is merely seeking a second forfeiture and fine against this defendant.

THIRD DEFENSE

The claims in this Complaint against this defendant are barred by applicable statutes of limitation.

FOURTH DEFENSE

3.

The following paragraphs of plaintiff's Complaint are admitted: 1, 2 and 9. However, defendant denies any right in plaintiff to proceed under the Acts of Congress recited in paragraph one of the Complaint.

4.

The allegations of the following paragraphs of plaintiff's Complaint are denied: 10, 13, 14(a) and (b), 15(a) and (b), 17, 18, 19, 23, 24(a) and (b), 25, 26(a) and (b), and 28.

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5.

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations

contained in the following numbered paragraphs of the Complaint: 4, 5, 6, 7, 8, and 20. This defendant denies any right in plaintiff to proceed under the Acts of Congress recited in paragraph twenty of the Complaint.

6.

Answering paragraph 3 of plaintiff's Complaint this defendant shows that it maintains an office, transacts business and is found within the southern district of Florida; and that it is without knowledge or information sufficient to form a belief as to the allegations of paragraph 3 in respect to the other defendants.

7.

Answering paragraph 11 of plaintiff's Complaint this defendant admits that during the period covered by the Complaint the plaintiff, through its Naval installations in the Jacksonville area, purchased bakery products for use by such installations and by others; all other allegations of paragraph 11 are denied, except that bakery products were purchased from this defendant by plaintiff during the aforesaid period.

8.

Answering paragraph 12 of plaintiff's Complaint this defendant admits that plaintiff claims that it is bringing said action as alleged, but denies that it has any right to do so.

9.

Answering paragraph 16 of plaintiff's Complaint
22 this defendant admits that it entered into contracts
□ for the sale of bakery products to said Jacksonville Naval installations and received payments therefor; but this defendant denies all other allegations of paragraph 16 as alleged.

10.

Answering paragraph 21 of the plaintiff's Complaint being a part of Count II, this defendant shows that it operates a bakery in Jacksonville and did so during the period covered by the Complaint and baked and sold bakery prod-

ucts. This defendant is without knowledge or information sufficient to form a belief as to all other allegations of paragraph 21 of plaintiff's Complaint.

11.

Answering paragraph 22 of plaintiff's Complaint, this defendant avers that during the period of time covered by the Complaint it operated a baking plant in Jacksonville; that it operated trucks which regularly delivered bread from this defendant's bakery in Jacksonville to wholesale accounts, including U. S. Naval installations located in Jacksonville, and sporadically to Naval installations at Glynco, Georgia. This defendant is without knowledge or information sufficient to form a belief concerning the allegations as to the other defendants. All other allegations of paragraph 22 of said Complaint are denied.

12.

Answering paragraph 27 of plaintiff's Complaint this defendant avers that plaintiff purchased substantial quantities of bakery products from this defendant for use
23 at U. S. Naval installations in the Jacksonville area; and is without knowledge or information concerning the allegations as to the other defendants; and denies all other allegations of paragraph 27.

WHEREFORE, the defendant, Southern Bakeries Company, demands a trial by jury of the issues in this cause and demands judgment dismissing the Complaint and awarding it the costs and expenses of the defense of this action.

/s/ JOHN H. BOMAN, JR.

/s/ CRENSHAW, HANSELL, WARE,
BRANDON & DORSEY

Attorneys for the defendant
Southern Bakeries Company
310 Fulton Federal Building
Atlanta 3, Georgia.

CERTIFICATE OF SERVICE

(Omitted in printing)

(File endoresement omitted)

28

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 4735-Civil-J

(Title omitted)

**Answer of the Defendant Flowers Baking Company, Inc.—
Filed October 13, 1961**

Flowers Baking Company, Inc., a corporation, one of the defendants herein, by its undersigned attorneys, files this its answer to the complaint and says:

FIRST DEFENSE

I

As to paragraph 1 of said Complaint, this defendant admits that the plaintiff seeks to invoke the jurisdiction of this Court pursuant to the statutory provisions referred to therein but states that it is without knowledge or information to form a belief as to the capacity in which the plaintiff sues. This defendant further denies that the plaintiff can invoke the jurisdiction of this Court pursuant to the False Claims Act and said Sherman Act referred to therein.

II

As to paragraph 2 of said Complaint, this defendant admits that it is a corporation but states that it is without knowledge as to the type of business organization under which other defendants do business.

29

III

As to paragraph 3 of said Complaint, this defendant admits that it maintains offices and transacts business within the Southern District of Florida but states that it is without knowledge of the other allegations set forth there.

IV

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 4, 5, 6, 7 and 9 of said Complaint.

V

As to paragraph 8 of said Complaint, this defendant admits the allegations therein set forth.

VI

This defendant denies the allegations of paragraph 10 of said Complaint.

VII

As to paragraph 11 of said Complaint, this defendant admits that the plaintiff purchased bakery goods for naval installations in the Jacksonville area but it denies each and every other allegation set forth in said paragraph except that it sold bakery goods to the plaintiff during the period covered by said Complaint, but this defendant is without knowledge as to whether all suppliers of bakery goods are defendants herein.

VIII

As to paragraph 12 under Count One of said Complaint, this defendant is without knowledge or information as to the truth of the allegations, but this defendant denies that plaintiff can invoke the jurisdiction of this Court under the False Claims Act therein cited.

30

IX

This defendant denies the allegations of paragraphs 13, 14 and 15 under Count One of said Complaint.

X

This defendant denies the allegations of paragraph 16 under Count One of said Complaint but admits that it has been awarded contracts for the sale of bakery products to naval installations and has received payment thereunder.

XI

This defendant denies the allegations of paragraphs 17, 18 and 19 under Count One of said Complaint.

XII

As to paragraph 20 under Count Two of said Complaint, this defendant admits that the same is brought pursuant

to the statute therein set forth but states that it is without knowledge or information sufficient to form a belief as to the capacity in which plaintiff sues. This defendant further denies that plaintiff can invoke the jurisdiction of this Court under Section 4 of the Sherman Act.

XIII

As to paragraph 21 under Count Two of said Complaint, this defendant is without knowledge of the volume of bakery products sold by other defendants in the Jacksonville area during 1959 and has no information sufficient to form a belief as to the truth of the allegations therein set forth.

XIV

As to paragraph 22 of Count Two of said Complaint, this defendant admits that it operates a baking plant in the Jacksonville area as alleged but it is without knowledge as to the alleged interstate operations by other defendants, and this defendant specifically denies that it has been engaged in interstate commerce in the sale of bakery products in the Jacksonville area.

XV

This defendant denies the allegations of paragraphs 23, 24, 25 and 26 under Count Two of said Complaint.

XVI

As to paragraph 27 under Count Two of said Complaint, this defendant says that it sold quantities of bakery goods to the plaintiff for use in naval installations in the northern part of the State of Florida but it is without knowledge of purchases by the plaintiff from other defendants. This defendant denies all other allegations of said paragraph 27.

XVII

This defendant denies the allegations of paragraph 28 under Count Two of said Complaint.

SECOND DEFENSE

The Complaint herein fails to state a claim against the defendant Flowers Baking Company, Inc. upon which relief can be granted.

THIRD DEFENSE

The claims in said Complaint against the defendant Flowers Baking Company, Inc. are barred by applicable statutes of limitation.

FOURTH DEFENSE

As to Count One of said Complaint, a Grand Jury duly empaneled by the United States District Court for the Southern District of Florida, Jacksonville Division, did on the 6th day of March, 1961, return to this Court an indictment against this defendant (Case No. 11,677-J 32 Criminal) charging it with a crime against the United States for and on account of the same acts and transactions as in Count One charged and set forth. On April 11, 1961 this defendant tendered to this Court a plea of nolo contendere to said indictment, which plea was accepted by this Court, and upon said plea sentence was passed and imposed upon this defendant. The plaintiff by instituting and prosecuting Count One of this Complaint seeks to recover a forfeiture and penalty and by so doing subjects this defendant to double jeopardy for the same offense in violation of rights guaranteed to it by the Fifth Amendment to the Constitution of the United States.

WHEREFORE the defendant Flowers Baking Company, Inc. demands a trial by jury and judgment dismissing the Complaint and awarding it the costs and expenses of the defense of this action.

/s/ JOHN W. BALL

/s/ DAVISSON F. DUNLAP

*Attorneys for defendant
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Inc.*

ADAIR, ULMER, MURCHISON,
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Jacksonville, Florida

*Of Counsel for
Flowers Baking Company, Inc.*

CERTIFICATE OF SERVICE
(Omitted in printing)

(File endorsement omitted)

33

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

**Answer of Defendant, American Bakeries Company—
Filed October 13, 1961**

American Bakeries Company, one of the defendants herein, subject to its motion to dismiss the complaint filed herein, makes this its answer to plaintiff's complaint and for cause thereof says:

FIRST DEFENSE—COUNT ONE

1.

This defendant admits the allegations contained in paragraphs 1 through 9 inclusive of this complaint.

2.

This defendant denies the allegations contained in paragraph 10 of the complaint herein.

3.

Answering paragraph 11 of the complaint, this defendant admits that during the period covered by this complaint, United States of America through its Naval installations in the Jacksonville area, (as that term is defined), purchased bakery products for use by said installations and admits that all such purchases of bakery products complained of here were from one or more of the defendants in this action. In all other respects the allegations of paragraph 11 are each and all denied.

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4.

Paragraph 12 of the complaint is admitted.

5.

This defendant denies each and every allegation contained in paragraph 13.

6.

This defendant denies each and every allegation contained in paragraph 14.

7.

This defendant denies each and every allegation contained in paragraph 15.

8.

Answering paragraph 16, this defendant admits that it did enter into some contracts for the sale of bakery products to the Naval installations described and that it did receive payment for bakery products delivered under these contracts. This defendant is informed and believes that its co-defendants, Ward Baking Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company, have entered into like contracts for other periods and that they have, in like manner received payments for deliveries made thereunder. American Bakeries Company asserts that each of the contracts described which it entered into consists of a written request for proposal, a written proposal submitted by it at the invitation of plaintiff and a written acceptance thereof by these Naval installations on behalf of plaintiff. None of the proposals thereof made by this defendant contained false, fraudulent or fictitious representations nor were these proposals in any manner falsely nor fraudulently represented to the United States by this defendant. Except as expressly admitted, all allegations of paragraph 16 are denied.

35

9.

In response to paragraph 17 of the complaint, this defendant admits that with respect to the contracts awarded it for the supply of bakery products it submitted to plaintiff claims for approval and payment. This defendant denies all other allegations of said paragraph and expressly denies that any of the claims so submitted were false or fraudulent or that any of these claims were based upon contracts which were falsely or fraudulently procured.

10.

In response to paragraph 18, this defendant admits that the claims which it presented were paid but it denies that

any such claims were false or fraudulent. This defendant further admits that when plaintiff made payment of this defendant's claims, it had no knowledge of any falsity or fraud therein because none existed.

11.

Each and every allegation of paragraph 19 is denied.

FIRST DEFENSE—COUNT II.

12.

Paragraphs 20, 21 and 22 of plaintiff's complaint are admitted.

13.

This defendant denies each and every allegation contained in paragraph 23 of plaintiff's complaint.

14.

This defendant denies each and every allegation of paragraph 24 of plaintiff's complaint.

15.

This defendant in answer to paragraph 25 of plaintiff's complaint denies each and every allegation therein contained including the allegations of paragraph 15(a) of Count One of this complaint which are adopted and re-alleged by reference.

16.

Each and every allegation of paragraph 26 of plaintiff's complaint is denied.

17.

In answering paragraph 27, this defendant admits that since 1957 plaintiff has purchased substantial quantities of bakery products from defendants for use at United States Naval installations in the Jacksonville area. All other allegations of paragraph 27 of the complaint are denied.

18.

This defendant denies each and every allegation contained in paragraph 28 of plaintiff's complaint.

SECOND DEFENSE—COUNT I

19.

For a second defense to count one of plaintiff's complaint (paragraph 1 through 19 and prayers following

paragraph 19) American Bakeries Company asserts that as a matter of law, the facts and things complained of do not, even if true as alleged, constitute a claim upon which the relief of double damages and forfeitures can be granted under the False Claims Act (31 U.S.C., § 231-233) or upon which any other relief sought can be granted.

SECOND DEFENSE—COUNT II

For a second defense to count two of plaintiff's complaint, this defendant asserts that as a matter of law plaintiff is not entitled to have the equitable relief prayed nor any other relief of an equitable nature against this defendant by virtue of the facts and things alleged and set out in count two of the complaint (paragraphs 20 through 28 and prayers following 28) for the reason that it is nowhere alleged that the combination or conspiracy described is still operative and in effect or that the
37 defendants or any of them are presently engaged in doing or threatening to do any acts pursuant or in furtherance of the alleged conspiracy at the present time.

WHEREFORE, having fully answered, defendant, American Bakeries Company, demands trial by jury of the legal issues made and prays that it be discharged.

/s/ FRED KENT

/s/ DAVISON F. DUNLAP

/s/ JOHN BALL

/s/ M. H. BLACKSHEAR, JR.

*Attorneys for Defendant
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*Of Counsel for Defendant,
American Bakeries Company*

41

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Criminal No. 11,677-J

UNITED STATES OF AMERICA, *Plaintiff,*

v.

WARD BAKING COMPANY,
AMERICAN BAKERIES COMPANY,
DEEST BAKING COMPANY,
FLOWERS BAKING COMPANY, INC., and
SOUTHERN BAKERIES COMPANY,
Defendants.

Indictment—Filed March 6, 1961

The Grand Jury Charges:

I

DEFINITION OF TERMS

1. As used herein, the term:

- (a) "Bakery products" means bread and rolls.
- (b) "Jacksonville area" means the area within (1) the Northern part of the State of Florida, and (2) the Southeastern part of the State of Georgia.

II

THE DEFENDANTS

2. Ward Baking Company (hereinafter called "Ward") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, New York. It owns and operates a baking plant in Jacksonville, Florida, and in various other States.

3. American Bakeries Company (hereinafter called "American") is hereby indicted and made a defendant.

herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Chicago, Illinois. It owns and operates a baking plant in Jacksonville, Florida, and in various other States.

4. Derst Baking Company (hereinafter called "Derst") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Savannah, Georgia. It owns and operates a baking plant in Savannah, Georgia.

5. Flowers Baking Company, Inc. (hereinafter called "Flowers") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Thomasville, Georgia. It owns and operates a baking plant in Jacksonville, Florida, and a baking plant in Thomasville, Georgia.

6. Southern Bakeries Company (hereinafter called "Southern") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Atlanta, Georgia. It owns and operates a baking plant in Jacksonville, Florida, and in various other States.

7. Whenever in this indictment reference is made to any act, deed or transaction on the part of any defendant corporation, such allegation shall be deemed to mean that the directors, officers or agents of such corporation authorized, ordered, or did such act, deed or transaction, for or on behalf of such defendant corporation while actively engaged in the management, direction and control of its affairs.

III

NATURE OF TRADE AND COMMERCE

8. The defendants operate the largest bakeries in the Jacksonville area and during the period covered by this indictment, said defendants baked approximately 90% of

the bakery products sold in said area. In 1959 total sales by the defendants of bakery products in the Jacksonville area amounted to approximately \$11,000,000.

43 9. During the period of time covered by this indictment, the defendants purchased substantial amounts of flour, sugar, yeast and other ingredients used by them in the production of bakery products from suppliers located in States other than Florida and Georgia. Said ingredients were shipped by said suppliers from their places of business outside Florida and Georgia to the bakeries of the defendants in the States of Florida and Georgia.

10. During the period of time covered by this indictment, each of the defendants operated a baking plant in the Jacksonville area. The defendants Ward, Southern and American owned and operated trucks which regularly and frequently delivered bread from their bakeries in Jacksonville, Florida to wholesale accounts, including United States Government Naval installations, located in the State of Georgia. Thus, there was a regular, continuous and substantial flow of bakery products in interstate commerce between the bakeries of the defendants Ward, Southern and American in Jacksonville, Florida and their wholesale accounts and United States Government Naval installations located in Georgia.

IV

OFFENSE CHARGED

11. Beginning in or about September 1957, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendants named herein, together with others to the Grand Jurors unknown, have engaged in a combination and conspiracy in unreasonable restraint of the hereinbefore described trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

12. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants, and others to the Grand Jurors unknown, the substantial terms of which have been and are:

- (a) To allocate among themselves the business of supplying bakery products to Federal Naval installations in the Jacksonville area; and
- (b) To submit noncompetitive, collusive, and rigged bids and price quotations for supplying bakery products to Federal Naval installations in the Jacksonville area.

13. During the period of time covered by this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and others to the Grand Jurors unknown, by agreement and concerted action, have done those things which, as hereinbefore alleged, they conspired and agreed to do.

EFFECTS

14. The effects of the aforesaid combination and conspiracy have been and are that:

- (a) Competition among the defendants in the sale and distribution of bakery products to Federal Naval installations in the Jacksonville area has been suppressed and eliminated, and
- (b) Federal Naval installations in the Jacksonville area engaged in the purchase of bakery products have been denied the right to receive competitive sealed bids as required by law and have been forced to pay artificially-fixed prices for bakery products.

VI

JURISDICTION AND VENUE

- 15. The combination and conspiracy charged in this indictment has been entered into and carried out in part within the Southern District of Florida where the defendants, except defendant Derst, own and

operate baking plants. During the period of time covered by this indictment and within the five years next preceding the return thereof, the defendants, pursuant to said combination and conspiracy, have committed within the Southern District of Florida many of the acts herein charged.

Dated:

A TRUE BILL

/s/ HENRY M. STUCKEY
Henry M. Stuckey
Attorney, Department of Justice

/s/ ROBERT L. FINCH
Foreman

/s/ W. WALLACE KIRKPATRICK
Acting Assistant Attorney General

/s/ CHARLES L. WHITTINGHILL
Attorney, Department of Justice

/s/ JOHN L. BRIGGS
Asst. United States Attorney

(File endorsement omitted)

46

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

**Answer of the Defendant, Ward Baking Company—
Filed October 13, 1961**

Ward Baking Company, a corporation, one of the defendants herein, by its undersigned attorneys, files this, its answer to the Complaint, and says:

FIRST DEFENSE

I

This defendant denies the allegations in Paragraph 1 of the Complaint, except it admits that the plaintiff seeks to invoke the jurisdiction of this court pursuant to the

statutory provisions referred to herein and states that it is without knowledge or information sufficient to form a belief as to the capacity in which plaintiff sues. This defendant further denies that the plaintiff can invoke jurisdiction of this court pursuant to the False Claims Act (31 U.S.C. Secs. 231-233) or to Sec. 4 of the Sherman Act (C 647, 26 Stat. 209 as amended).

II

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of the complaint, except it admits those allegations insofar as they relate to it.

47

III

This defendant denies the allegations in Paragraph 10 of the Complaint.

IV

This defendant denies the allegations in Paragraph 11 of the Complaint except that it admits that during the period covered by the Complaint the plaintiff purchased bakery products for use by its naval installations in the Jacksonville area and this defendant is without knowledge as to whether all purchases of bakery products were from the defendants in this action.

V

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation in Paragraph 12, except that it denies the plaintiff can invoke the jurisdiction of this court pursuant to the False Claims Act (31 U.S.C. Secs. 231, 232 and 233).

VI

This defendant denies the allegations in Paragraphs 13, 14, 15, 16, 17, 18 and 19 of the Complaint, except it admits that during the said period it sold bakery products to naval installations in the Jacksonville area pursuant to contracts and received payment therefor.

VII

This defendant denies the allegations in Paragraph 20 of the Complaint, except that it admits the plaintiff seeks to invoke the jurisdiction of this court pursuant to the statutory provision referred to therein and states that it is without knowledge or information sufficient to form a belief as to the capacity in which the plaintiff sues. The defendant further denies that plaintiff can invoke the jurisdiction of this court pursuant to Section 4 of the Sherman Act (C 647 26 Stat. 209).

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VIII

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 21, except that it admits during the period covered by the Complaint it operated a bakery in Jacksonville, Florida and sold bakery products in that area.

IX

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 22 of the Complaint, except that it admits that it has delivered bread from its bakery in Jacksonville, Florida to wholesale accounts, including United States naval installations located in the State of Georgia.

X

This defendant denies the allegations in Paragraphs 23, 24, 25 and 26 of the Complaint.

XI

This defendant denies the allegations in Paragraph 27 of the Complaint except it admits that since 1957 plaintiff has purchased bakery products from defendants for use at United States naval installations in the Jacksonville area.

XII

This defendant denies the allegations in Paragraph 28 of the Complaint.

SECOND DEFENSE

Complaint fails to state a claim against this defendant upon which relief can be granted as to Count I and Count II of the Complaint.

THIRD DEFENSE

The claims asserted in this Complaint against the defendant, Ward Baking Company, are barred by applicable statutes of limitation.

49

FOURTH DEFENSE

As to Count I of this Complaint, the defendant, Ward Baking Company, by institution of this proceeding has been placed in double jeopardy.

In former criminal proceedings, Case No. 11677 Cr. J, in this court, this defendant pleaded nolo contendere to a grand jury indictment which recited the same acts and transactions set forth in Count I of the Complaint.

The court accepted the plea of nolo contendere and levied a fine of \$5,000.00 against the defendant in favor of the United States of America, the plaintiff in this cause.

The plaintiff, in seeking to recover another forfeiture and penalty against this defendant under Count I of the Complaint is placing the defendant in double jeopardy in violation of Article V of the United States Constitution.

WHEREFORE, the defendant, Ward Baking Company, demands a trial by jury of the issues in this cause and demands judgment dismissing the complaint and awarding it the costs and expenses of the defense of this action.

FRED H. KENT

DAVISSON F. DUNLAP

Adair, Ulmer, Murchison, Kent & Ashby

Attorneys for the defendant,

Ward Baking Company

1215 Barnett Bank Building

Jacksonville 2, Florida

CERTIFICATE OF SERVICE

(Omitted in printing)

(File endorsement omitted)

51

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Answer of Derst Baking Company—Filed October 18, 1961

COMES NOW DERST BAKING COMPANY, one of the defendants in captioned cause, and for answer respectfully shows to the Court that for want of sufficient information this defendant cannot answer any part of the complaint as it relates to any of the other defendants, but as the complaint relates to it, Derst Baking Company shows the following:

JURISDICTION AND VENUE

-1-

Answering Paragraph 1, defendant denies venue and jurisdiction as to it in both Counts I and II.

-2-

Answering Paragraph 2, defendant admits that it is a corporation.

-3-

Answering Paragraph 3, defendant shows that it does not maintain an office, it does not transact business, and it is not found within the Southern District of Florida.

52

DEFINITION OF TERMS

-4-

No answer is required to Paragraph 4.

THE DEFENDANTS

-5-

For want of sufficient information, defendant can neither admit nor deny the allegations of Paragraph 5.

-6-

For want of sufficient information, defendant can neither admit nor deny the allegations of Paragraph 6.

-7-

Defendant admits the allegations of Paragraph 7.

-8-

For want of sufficient information, defendant can neither admit nor deny the allegations of Paragraph 8.

-9-

For want of sufficient information, defendant can neither admit nor deny the allegations of Paragraph 9.

-10-

Defendant denies the allegations of Paragraph 10.

-11-

Answering Paragraph 11, defendant admits that the United States of America, through its naval installation at Glynco, Georgia, purchased bakery products for use at that installation. This defendant further admits that during the period referred to in the complaint, on occasions this defendant sold bakery goods to said installation at Glynco, Georgia. This defendant denies all the remaining allegations of Paragraph 11.

FIRST DEFENSE TO COUNT I

-12-

The allegations of Paragraph 12 do not require answer, except to state that the United States of America states no cause of action against this defendant in Count I.

-13-

Defendant denies the allegations of Paragraph 13.

-14-

Defendant denies the allegations of Paragraph 14, including sub-paragraphs 14 (a) and 14 (b).

-15-

Defendant denies the allegations of Paragraph 15, including sub-paragraphs 15 (a) and 15 (b).

-16-

Defendant denies the allegations of Paragraph 16.

-17-

Answering the allegations of Paragraph 17, this defendant admits that it did during said period of time sell bakery goods on occasion to the United States naval installation at Glynco, Georgia and that it did present bills for payment of such goods delivered. All other allegations of Paragraph 17 are denied.

-18-

Answering the allegations of Paragraph 18, this defendant admits that it was paid for the goods that it sold to the United States naval installation as aforesaid, but expressly denies all other allegations of Paragraph 18.

-19-

Defendant denies the allegations of Paragraph 19.

FIRST DEFENSE TO COUNT II

-20-

The allegations of Paragraph 20 do not require answer, however this defendant shows that the United States of America states no cause of action against this defendant in Count II.

-21-

Answering the allegations of Paragraph 21, this defendant shows that it does not maintain any office, it is not transacting any business, it is not found and it does not sell any bakery products within the geographical limits of the State of Florida. As previously stated, defendant, during the period covered by Count II, did upon occasion sell bakery goods to the United States naval installation at Glynco, Georgia. All other allegations of Paragraph 21 are denied.

-22-

As the allegations of Paragraph 22 relate to any other defendants, for want of sufficient information this defendant can neither admit nor deny such alle-

gations. However, as such allegations may relate to this defendant, they are denied except that this defendant admits it operates a single bakery, and that is located in Savannah, Georgia.

-23-

This defendant denies the allegations of Paragraph 23.

-24-

This defendant denies the allegations of Paragraph 24, and sub-paragraphs 24(a) and 24(b).

-25-

Defendant denies the allegations of Paragraph 25.

-26-

Defendant denies the allegations of Paragraph 26 and sub-paragraphs 26 (a) and 26 (b) thereof.

-27-

Answering Paragraph 27, this defendant admits that during the period covered in said complaint, upon occasions, it has sold bakery products to the United States naval installation at Glynnco, Georgia. However, all other allegations of Paragraph 27 are denied.

-28-

This defendant denies the allegations of Paragraph 28.

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SECOND DEFENSE TO COUNT I

-29-

The allegations of Count I of the complaint fail to state a claim against this defendant upon which relief can be granted.

THIRD DEFENSE TO COUNT I

-30-

The allegations of Count I against this defendant are penal in nature. Therefore, Count I of the complaint should be dismissed as against this defendant because on the Sixth day of March, 1961, a grand jury impaneled by

the United States District Court for the Southern District of Florida, Jacksonville Division, indicted this defendant, charging it with a crime against the United States based upon the same acts and transactions alleged in Count I. This defendant, on April 11, 1961, entered a plea of nolo contendere to the indictment. The plea was accepted and a sentence was passed and imposed upon this defendant by the Court, this defendant paying a fine of \$2,500. The United States of America, by Count I of the complaint, seeks to subject this defendant to double jeopardy for the same offense in violation of this defendant's constitutional rights under the Constitution of the United States.

SECOND DEFENSE TO COUNT II

-31-

The allegations of Count II of the complaint fail to state a claim against this defendant upon which relief can be granted.

WHEREFORE, this defendant having fully answered the allegations of both Count I and Count II of the complaint, this defendant demands trial by jury of the issues subject to jury trial and prays that it be hence discharged without costs.

/s/ JOHN B. MILLER,
Attorney for Derst Baking
Company, Defendant

Of Counsel

HITCH, MILLER & BECKMANN
P. O. Box 2126
Savannah, Georgia

CERTIFICATE OF SERVICE

(Omitted in printing)

(File endorsement omitted)

251

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Motion of Ward Baking Company, et al. for Entry of Consent Judgment—filed May 8, 1962

The Defendants, Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company, before any testimony has been taken in the above captioned cause, move the court to enter against them a consent judgment as to Count Two of the Plaintiff's complaint, in accordance with the form of the proposed judgment annexed hereto and marked Exhibit "A", and for grounds of said motion, the said Defendants state:

1. The Plaintiff filed a complaint in this cause on July 21, 1961 against the said Defendants.

2. The said complaint contained in Count Two thereof the following allegations concerning alleged violations of the antitrust laws on the part of these Defendants and the effects of the said violations, and a prayer for relief to prevent and restrain the said violations:

"24. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and other persons to the plaintiff unknown, the substantial terms of which were:

(a) To allocate among themselves the business of supplying bakery products to United States Naval installations in the Jacksonville area; and

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(b) To submit noncompetitive, collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area.

"26. The effects of the aforesaid combination and conspiracy were that:

(a) Competition among the defendants in the sale and distribution of bakery products to United States Naval installations in the Jacksonville area has been suppressed and eliminated, and

(b) United States Naval installations in the Jacksonville area engaged in the purchase of bakery products have been denied the right to receive competitive sealed bids as required by law and have been forced to pay artificially-fixed prices for bakery products.

"28. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids solicited by it during the period covered by this complaint, at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the benefit of competition in prices for bakery products. By the operation of defendants' agreements and concert of action herein alleged, plaintiff has been compelled to pay higher prices than would have been the case but for the violations of the antitrust laws herein alleged.

"WHEREFORE, plaintiff prays:

253 (a) That the aforesaid combination and conspiracy, agreements and arrangements be adjudged by the Court to be in unreasonable restraint of the trade and commerce described in this complaint and in violation of Section 1 of the Sherman Act; and that the Court adjudge and decree that the defendants have combined and conspired to restrain interstate trade and commerce in violation of Section 1 of the Sherman Act.

(b) That the defendants be enjoined from (1) allocating among themselves the business of supplying bakery products to United States Naval installations in the Jacksonville area and (2) from submitting non-competitive collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area.

(c) That the plaintiff have such further, general, and different relief as the nature of the case may require and the Court may deem appropriate in the premises.

(d) That the plaintiff recover its taxable costs."

3. In the said complaint the plaintiff defined the term "Bakery Products" and "Jacksonville Area" as used in the complaint, as follows:

"4. As used in this complaint:

(a) "Bakery products" means bread and rolls.

(b) "Jacksonville area" means the area within (1) the northern part of the State of Florida, and (2) the southeastern part of the State of Georgia."

4. The form of the proposed judgment tendered as Exhibit "A" attached to this motion is framed in the language used by the Plaintiff in its prayer for relief and provides the Plaintiff, the United States Government, with every safeguard needed to accomplish the only proper purpose of Count Two of the Plaintiff's complaint, namely, 254 the prevention and restraint of violations of the anti-trust laws as set forth in Count Two of said complaint.

5. That the Plaintiff and Defendants have settled Count One of the complaint by agreement between them, and therefore all issues between the moving Defendants and the Plaintiff stand resolved and there remains no just reason for delaying the entry of the final judgment against these Defendants in accordance with the proposed form of judgment annexed to this motion as Exhibit "A".

6. By entry of the proposed consent judgment, both the Plaintiff and Defendants will be spared the ordeal of a costly and protracted trial and the entry of such consent judgment will be in accordance with the Congressional policy to encourage consent judgments and decrees in anti-trust cases wherein the government is plaintiff and private parties are defendants. See *Twin Ports Oil Co. v. Pure Oil Co., et al.* (D.C.D. Minn. 1939) 26 F. Supp. 366.

/s/ JOHN W. BALL of
Ulmer, Murchison, Kent, Ashby
& Ball

850 Florida National Bank
Building

Jacksonville, Florida

Attorneys for Flowers

Baking Company, Inc.

/s/ M. H. BLACKSHEAR, JR. of
King & Spalding
434 Trust Company of Georgia
Building
Atlanta 3, Georgia

FRED H. KENT

/s/ DAVISSON F. DUNLAP of
Ulmer, Murchison, Kent, Ashby
& Ball

850 Florida National Bank
Building
Jacksonville, Florida
Attorneys for Ward Baking
Company

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/s/ JOHN H. BOMAN, JR. of
Hansell, Post, Gardner, Brandon
& Dorsey

310 Fulton Federal Building
Atlanta 3, Georgia
Attorneys for Southern
Bakeries Company

/s/ JOHN B. MILLER of
Hitch, Miller, Beckmann &
Simpson

400 Georgia State Bank
Building
Savannah, Georgia
Attorneys for Derst Baking
Company

CERTIFICATE OF SERVICE

(Omitted in printing)

Exhibit "A" to Motion**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION****Civil No. 4735-Civ.-J****UNITED STATES OF AMERICA, *Plaintiff,*****-VS-****WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY,
DERST BAKING COMPANY, FLOWERS BAKING COMPANY, INC.,
and SOUTHERN BAKERIES COMPANY, *Defendants.*****FINAL JUDGMENT—COUNT II**

Plaintiff, United States of America, having filed its complaint herein in two Counts on July 21, 1961, and final judgment having been entered on Count I of the complaint and the defendants by their respective attorneys having filed a Motion for Entry of a Judgment in conformity with the relief sought by the plaintiff in its complaint, without trial or adjudication of any of the issues of fact or law herein and before the taking of any testimony; it is hereby

ORDERED, ADJUDGED AND DECREED upon Count II of the complaint as follows:

I

This Court has jurisdiction of the subject matter hereof and of the parties consenting hereto and Count II of the complaint states a claim upon which relief may be granted against the defendants under § 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" commonly known as the Sherman Act, as amended.

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II

As used in this final judgment:

(a) "Bakery products" means bread and rolls.

(b) "Jacksonville area" means the area within (1) the northern part of the State of Florida, and (2) the southeastern part of the State of Georgia.

III

The provisions of this final judgment applicable to any defendant shall apply also to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this final judgment by personal service or otherwise.

IV

Each of the defendants is enjoined and restrained from directly or indirectly entering into, adhering to, or claiming or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other person to:

(a) Submit noncompetitive, collusive or rigged bids, or quotations for supplying bakery products to United States Naval installations in the Jacksonville area, or

(b) Allocate, divide or rotate the business of supplying bakery products to United States Naval installations in the Jacksonville area.

V

Each defendant is enjoined and restrained from directly or indirectly disclosing to or exchanging with any seller of bakery products the intention to submit or not submit a bid or quotation for supplying bakery products to United States Naval installations in the Jacksonville area, the fact that such a bid or quotation has or has not been submitted or made, or the content or terms of any such bid or quotation.

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VI

Each defendant is ordered and directed for a period of three years after the date of entry of this final judgment, to submit a sworn statement in the form set forth in the Appendix hereto with each bid for bakery products submitted to any Naval installation in the Jacksonville area (unless such installation requires the submission of a different type of sworn statement to the same effect), such sworn statement to be signed by the person actually responsible for the preparation of said bid.

VII

For the purpose of securing compliance with this final judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(a) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to the supplying of bakery products to any Naval installation in the Jacksonville area; and

(b) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters contained in this final judgment.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendant shall submit such written reports with respect to supplying bakery products to any Naval installation in the Jacksonville area.

259 No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this final judgment in which the United States is a party or as otherwise required by law.

VIII

Jurisdiction is retained for the purpose of enabling any of the parties to this final judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this final judgment, for the modification or

termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

DATED at Jacksonville, Florida _____,
1962.

United States District Judge

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APPENDIX

Affidavit

The undersigned hereby certifies to his best knowledge and belief that:

(1) The bid to _____

(name of recipient of bid) dated _____

has not been prepared by _____

(name of defendant) in collusion with any other seller of bakery products, and

(2) The prices, terms or conditions of said bid have not been communicated by the undersigned nor by any employee or agent of _____

(name of defendant), to any other seller of bakery products and will not be communicated to any such seller prior to the official opening of said bid,

in violation of the Final Judgment in Civil No. 4735-Civ.-J entered by the United States District Court for the Southern District of Florida, Jacksonville Division, on _____

_____, 1962.

Dated: _____, 1962.

Signature of person
responsible for the preparation
of the bid

(Filed endorsement omitted)

262

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

**Stipulation and Order Dismissing Count I of the Complaint—
May 8, 1932**

Derst Baking Company having been dismissed by the Court from Count I of the complaint, and \$44,000 having been paid to plaintiff in full settlement of Count I, it is stipulated and agreed by and between the plaintiff and the remaining defendants, by their attorneys, that Count I of the complaint be and it is hereby dismissed as to Ward Baking Company, American Bakeries Company, Flowers Baking Company, Inc. and Southern Bakeries Company, with prejudice.

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/s/ HENRY M. STUCKEY
Attorney, Department of Justice

/s/ JOHN W. BALL
Ulmer, Murchison, Kent, Ashby & Ball
850 Florida National Bank Building
Jacksonville, Florida
Attorneys for Flowers Baking Company Inc.

/s/ M. H. BLACKSHEAR, JR.
King & Spalding
434 Trust Company of Georgia Building
Atlanta 3, Georgia
Attorneys for American Bakeries Company

/s/ JOHN B. MILLER
Hitch, Miller, Beckmann & Simpson
400 Georgia State Bank Building
Savannah, Georgia
Attorneys for Derst Baking Company

/s/ **DAVISSON F. DUNLAP**

Ulmer, Murchison, Kent, Ashby & Ball
850 Florida National Bank Building
Jacksonville, Florida

Attorneys for Ward Baking Company

/s/ **JOHN H. BOMAN, JR.**

Crenshal, Hansell, Ware, Brandon & Dorsey
310 Fulton Federal Building
Atlanta 3, Georgia

Attorneys for Southern Bakeries Company

So Ordered this 8th day of May 1962

BRYAN SIMPSON

Chief Judge, United States
District Court

(Filed endorsement omitted)

264

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

**Order on Motion of Defendant Derst Baking Company to Quash
Service and to Dismiss Complaint as to Count I—May 8, 1962**

Defendant, Derst Baking Company, having filed its motion to quash service as to Count I and to dismiss the complaint as to Count I;

This motion having come on for hearing before me this date; and after considering arguments of Counsel thereon;

It Is CONSIDERED, ORDERED AND ADJUDGED that defendant, Derst Baking Company's motion to quash service as to Count I and to dismiss the complaint as to Count I be and it is hereby granted and Count I of the complaint be and it is hereby dismissed as against defendant, Derst Baking Company.

So ordered this 8th day of May, 1962.

BRYAN SIMPSON

Judge, USDC, Southern District
of Florida

(Filed endorsement omitted)

265

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Order to Show Cause—May 8, 1962

This cause coming on for hearing for conference on all remaining issues upon the joint motion of attorneys for plaintiff and defendants, and attorneys for the plaintiff and defendants being present, and the defendants having filed a motion for entry of a consent judgment and having served the same on attorney for the plaintiff, and having tendered to the Court as Exhibit "A" to said motion a proposed form of consent judgment on Count II of the said complaint, and attorney for the plaintiff having also tendered to the Court a proposed form of final judgment on Count II of said complaint, and having considered the same,

It is hereby ordered that the plaintiff show cause before this Court on June 14, 1962 at 9:30 A.M. why the said proposed judgment on Count II and attached as Exhibit "A" to the defendants' motion for entry of consent judgment should not be entered by this Court and that the plaintiff, if it desires to file a written formal reply to this order and the defendants' said motion, file and serve on counsel for defendants on or before June 1, 1962 such formal written reply.

DATED at Jacksonville, Florida this May 8, 1962.

BRYAN SIMPSON

United States District Judge

266

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Statement of Objections in Response to Show Cause Order—
May 31, 1962

1. The Government objects to the failure of the judgment to adjudge that, the defendants have engaged in a

combination and conspiracy in unreasonable restraint of interstate trade and commerce in the sale of bakery products in violation of Section 1 of the Sherman Act.

2. The Government also objects to confining the scope of the injunction to bids for supplying bread and rolls to United States Naval Installations in the Jacksonville area.

3. The Government also objects to limiting the requirement of Section VI, that bids be accompanied by sworn statements of non-collusion, to a three year period.

Dated: May 31, 1962

Respectfully submitted

HENRY M. STUCKEY

Attorney, Department of Justice.

268

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

**Plaintiff's Memorandum in Support of Its Opposition to Motion
for Entry of Consent Judgment—May 31, 1962**

On May 8, 1962, the defendants in this case filed a motion entitled "Motion for Entry of Consent Judgment." Attached to the motion was a proposed form of judgment which purported to give the precise relief prayed for in the complaint. On May 8, 1962, the Court entered an order directing the Government to show cause why the defendants' motion should not be granted.

The Government strongly opposes the motion for the following reasons.

I

**THE COURT IS WITHOUT POWER TO GRANT
THE DEFENDANTS' MOTION**

To begin with, the defendants are asking the Court to enter a document that has no legal existence. The defendants are asking the Court to enter a "consent" judgment. But there is no such document for the Government has not "consented" to any judgment in this case.

Since the parties have not consented to the entry of any judgment in this case, and since the defendants have denied the allegations of the complaint, and since there has been no admission of a violation of the Sherman Act, no testimony taken or any stipulation of facts, the Court does not have the power to enter any judgment in this case purporting to grant equitable relief. The only purpose of such relief in this case is to enjoin conduct, which if not enjoined, might result in further similar violations. 269 *Local 167 v. United States*, 291 U.S. 293, 299. In the absence of facts describing an admitted or adjudicated violation, the Court has no record on which it can determine the scope of relief needed to prevent such further violations.

There is no precedent to support the granting of the defendants' proposed motion. There is precedent against it.

On April 20, 1960, Judge Wyzanski dismissed a similar suggestion made by the defendants in the case of *United States v. Lake Asphalt and Petroleum Company of Massachusetts, et al.*, Civil Action No. 59-786-W, (D. Mass.), as "preposterous," saying:

It seems to be preposterous for me to purport to act on the consent of one side over the objection of the other side without making findings. It seems to me to be an absolute violation of every rule that I ever heard of.

On June 17, 1960, the Court, in *United States v. True Temper Corporation, et al.*, Civil Action No. 58-C-1159, (N.D. Ill.), granted the Government's motion to strike the defendant's answer which denied the substantive allegations but stated that "for purposes of this case only, it will not contest these allegations" and appended to the answer a tendered form of judgment.

In only one case, to the Government's knowledge, has a Court ever, in the absence of any admission of liability, testimony, findings of fact or consent of the parties, entered a judgment over the objection of one of the parties. In that case, *United States v. Brunswick-Balka-Collender, et al.*, Civil Action No. 59-C-163, (E.D. Wisc.), the Court, on March 27, 1962, at the request of the defendants, entered a judgment against the defendants and did so over the

objections of the Government. The Government has not yet filed a notice of appeal.

However, if appealed, whether the Supreme Court sustains the lower court or not, that case offers no precedent for the instant case. In that case the judgment that was entered was the result of extensive negotiations
270 between the Government and the defendants which culminated in a judgment that went beyond the relief prayed for in the complaint. In fact, the defendants in that case agreed to all injunctive relief requested by the Government. The defendants objected only to a provision that would require them to admit liability and concede guilt in any treble damage action brought by any state agency based on the same alleged conspiracy. The Court sustained that objection.

In entering the judgment, without that provision, the Court granted injunctive relief of the precise breadth sought by the Government.

It is therefore obvious that the *Brunswick* case is not a precedent for the defendants' motion. They are now seeking to compel the Government to accept narrower injunctive relief than the Government believes the facts warrant. The Government has no objection to a resolution of this issue by the Court upon a proper factual record. The Government insists only that it cannot be resolved by a comparison of the complaint and the proffered injunction, as the defendants' would have the Court resolve it.

II

THE GRANTING OF THE DEFENDANTS' MOTION WOULD NOT BE IN THE PUBLIC INTEREST

In addition to the fact that what the defendants are requesting violates every known rule of law or equity governing the entry of judgments, there are strong reasons of public policy why the judgment proposed by the defendants should not be entered in this case. In the Government's opinion the judgment proposed by the defendants shows on its face that it will not prevent future violations similar to the one charged in the complaint.

First, the judgment fails to give what the Government would be sure of getting if it went to trial and won,
271 that is, in addition, an adjudication of guilt. The value of such an adjudication is indicated by the

lengths to which the defendants have gone to avoid it. In this case and in a companion criminal case the defendants are and were charged with illegally combining and conspiring to fix the price of bread and rolls sold to the Naval installations in the Jacksonville, Florida, area. The Government stands ready to prove the charge. In the criminal case, the defendants have escaped an adjudication, usable in this case by pleading *nolo contendere*. Now, still unwilling to change their denials to Count II in the civil case but without offering to prove their innocence, they are asking the Court, in the absence of any facts, to enter a judgment, over the Government's objection, that would prevent any adjudication which the Government or any other party could use against them in this or any other litigation.

Second, in addition to an adjudication of guilt, the trial would result in the public exposure of the defendants' unlawful activities and such exposure is extremely valuable to the Government in connection with its efforts to enforce the antitrust laws and to engender respect for those laws by the community. Indeed, in its over-all enforcement efforts, a public exposure of the defendants' unlawful activities and an adjudication of guilt are often of more value to the Government than the specific injunctive relief that is obtained.

Third, if the case were to be tried the Government would be afforded the opportunity both at the trial and at the hearing on relief to offer evidence in support of its claim for injunctive relief broader than that offered by defendants' proposed judgment. It should be noted that defendants' proposed judgment ignores paragraph (C) of the Prayer requesting that the Plaintiff have such further, general, and different relief as the nature of the case may require and the Court may deem appropriate in the premises. Even if there were no separate hearing on relief, if the Government's evidence showed a need for broader relief than that offered by the defendants, 272 and we submit that it would, the Government would be entitled to such relief regardless of the specifics of its prayer. Rule 54(c) of the Federal Rules of Civil Procedure provides in part as follows:

• • • Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings.* (Emphasis supplied)

While the Government may agree to a consent settlement of a civil case, it cannot properly agree to a consent judgment which provides narrower injunctive relief than the nature of the violation charged warrants. The charge here is bid rigging in selling particular government installations. The defendants having been caught in the act of defrauding the naval installations in the Jacksonville area, it is extremely unlikely that the offense would be reflected in the same place in the same manner. The defendants have offered no proof which would justify the Court in holding that a repetition of the offense in another place with respect to other products sold by them is unlikely. If the injunction is to serve any practical purpose, it must be broad enough to prevent such violations. It is therefore the Government's position that the granting of the defendants' motion in this case would be contrary to sound judicial policy as well as the public interest in antitrust enforcement.

III

THE GOVERNMENT'S PROPOSED JUDGMENT IS IN THE PUBLIC INTEREST

The Government has offered to settle this case by the entry of a judgment which in the Government's opinion will serve the public interest. A copy of this judgment has been filed with the Court. As the Court will notice, the Government's proposed judgment is broader than that of the defendants in the following respects.

Section IV (B) and (C) of the Government's proposed judgment is comparable to Section IV (A) and (B) 273 of the defendants' proposed judgment with the exception that in the Government's proposed judgment the injunction against submitting rigged bids and allocating and rotating business applies to bakery products in general, rather than just "bread and rolls," and is not

confined merely to the Jacksonville area. In addition, Section IV (A) of the Government's proposed judgment contains a general injunction against conspiring to fix the price of bakery products sold to any third party, whereas defendants' proposed judgment relates solely to sales to United States Naval installations in the area.

Section V (B) of the Government's proposed judgment is comparable to Section V of the defendants' proposed judgment but, again, with the exception that in the Government's proposed judgment the injunction applies to bakery products in general, not just "bread and rolls," and is not confined merely to the Jacksonville area nor to sales to such Naval installations. In addition, Section V (A) of the Government's proposed judgment contains a general injunction against "urging or suggesting to any seller of bakery products the quotation or charging of any price or other terms or conditions of sale of bakery products."

Likewise, Section VI of the Government's proposed judgment is comparable to Section VI of the defendants' proposed judgment with the exception that the Government's proposed judgment is broader, requiring the submission of a sworn statement for a five-year period in connection with every bid to supply bakery products to any governmental agency, whereas the defendants' proposed judgment would require such submission for only a three-year period and would be confined to bids to supply "bread and rolls" to Naval installations "in the Jacksonville area," as defined in the defendants' draft.

In sum, the Government's proposed judgment is somewhat broader. But can it be said that the Government is unreasonable in being apprehensive that the defendants, having conspired to fix the price of bread and rolls to certain Government installations in a certain area, will not also attempt to fix the price of other bakery products to other Government installations.

274 The Government is not seeking punitive relief.

The defendants have sought to achieve an illegal purpose by traveling one road—is it unreasonable to close other roads by which they might renew their attempt to reach the same illegal end in regard to other products and in other areas!

Whether the case be litigated or not litigated, effective relief requires that the judgment be not confined simply to acts of the precise kind found to have been committed in the past. As the Supreme Court stated in *International Salt Company v. United States*, 332 U.S. 392, 400:

When the purpose to restrain trade appears from a clear violation of the law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.

In *Local 167 v. United States*, 291 U.S. 293, 299, the Supreme Court stated:

The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in the furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing the provisions doubts should be resolved in favor of the Government and against the conspirators.

And, in the recent decision in *United States v. E.I. du Pont de Nemours and Company, et al.*, 366 U.S. 316, 334 (1961), the Court has again emphasized:

For, it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.

275.

CONCLUSION

It is respectfully submitted that the defendants' motion should be denied.

Dated: May 31, 1962

/s/ HENRY M. STUCKEY

/s/ ALFRED KARSTED

Attorneys Department of Justice

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CERTIFICATE OF SERVICE

(Omitted in printing)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(File endorsement omitted)

(Title omitted)

**Motion for Leave to Amend Motion for Entry of Consent
Decree—Filed June 11, 1932**

The Defendants, Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company, move the court for leave to file an amended motion for entry of consent judgment, a copy of which is attached as Exhibit "A", on the ground that justice requires that the defendants be given an opportunity to correct any defects in their original motion filed herein..

/s/ JOHN W. BALL of
ULMER, MURCHISON, KENT,
ASHBY & BALL
850 Florida National Bank
Building
Jacksonville, Florida
*Attorneys for Flowers Baking
Company, Inc.*

/s/ M. H. BLACKSHEAR, JR. of
KING & SPALDING
431 Trust Company of Georgia
Building
Atlanta 3, Georgia
*Attorneys for American
Bakeries Company*

/s/ FRED H. KENT,
DAVISSON F. DUNLAP of
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ASHBY & BALL
850 Florida National Bank
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Jacksonville, Florida
*Attorneys for Ward Baking
Company*

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/s/ JOHN H. BOMAN, JR. of
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*Attorneys for Southern
 Bakeries Company*

/s/ JOHN B. MILLER of
 HITCH, MILLER, BECKMANN
 & SIMPSON
 400 Georgia State Bank Building
 Savannah, Georgia
*Attorneys for Derst Baking
 Company*

CERTIFICATE OF SERVICE
(Omitted in printing)

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Exhibit "A" to Motion

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Amended Motion for Entry of Judgment

The Defendants, Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company, before any testimony has been taken in the above captioned cause, move the court to enter against them a judgment as to Count Two of the Plaintiff's complaint, in accordance with the form of the proposed judgment annexed hereto and marked Exhibit "A", and for grounds of said motion, the said Defendants state:

1. The Plaintiff filed a complaint in this cause on July 21, 1961 against the said Defendants.

2. The said complaint contained in Count Two thereof the following allegations concerning alleged violations of the antitrust laws on the part of these Defendants and the effects of the said violations, and a prayer for relief to prevent and restrain the said violations:

"24. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and other persons to the plaintiff unknown, the substantial terms of which were:

280 (a) To allocate among themselves the business of supplying bakery products to United States Naval installations in the Jacksonville area; and

(b) To submit noncompetitive, collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area.

"26. The effects of the aforesaid combination and conspiracy were that:

(a) Competition among the defendants in the sale and distribution of bakery products to United States Naval installations in the Jacksonville area has been suppressed and eliminated, and

(b) United States Naval installations in the Jacksonville area engaged in the purchase of bakery products have been denied the right to receive competitive sealed bids as required by law and have been forced to pay artificially-fixed prices for bakery products.

"28. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids solicited by it during the period covered by this complaint, at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the benefit of competition in prices for bakery products. By the operation of defendants' agreements and concert of action herein alleged, plaintiff has been compelled to pay higher prices than would have been the case but for the violations of the anti-trust laws herein alleged.

"WHEREFORE, plaintiff prays:

(a) That the aforesaid combination and conspiracy, agreements and arrangements be adjudged by the

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Court to be in unreasonable restraint of the trade and commerce described in this complaint and in violation of Section 1 of the Sherman Act; and that the Court adjudged and decree that the defendants have combined and conspired to restrain interstate trade and commerce in violation of Section 1 of the Sherman Act.

(b) That the defendants be enjoined from (1) allocating among themselves the business of supplying bakery products to United States Naval installations in the Jacksonville area and (2) from submitting non-competitive collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area.

(c) That the plaintiff have such further, general, and different relief as the nature of the case may require and the Court may deem appropriate in the premises.

(d) That the plaintiff recover its taxable costs."

3. In the said complaint the plaintiff defined the term "Bakery Products" and "Jacksonville Area" as used in the complaint, as follows:

"4. As used in this complaint:

(a) "Bakery Products" means bread and rolls.

(b) "Jacksonville area" means the area within

(1) the northern part of the State of Florida, and

(2) the southeastern part of the State of Georgia."

4. The form of the proposed judgment tendered as Exhibit "A" attached to this motion is framed in much broader language than in the language used by the Plaintiff in its prayer for relief and provides for much greater scope of relief and grants the Plaintiff, the United States Government, with every safeguard needed to accomplish the only proper purpose of Count Two of the Plaintiff's complaint, namely, the prevention and restraint of

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violations of the antitrust laws as set forth in Count Two of said complaint. The form of proposed judgment tendered as Exhibit "A" grants to the plaintiff all of the relief which could be reasonably expected in this

case after litigation and if the court granted injunctive relief of a greater scope than that set forth in the proposed judgment, such relief would not have a constitutional or statutory basis in this action.

5. The Plaintiff shows by the attached affidavit of one of the counsel for Defendant, namely M. H. Blackshear, Jr., annexed hereto as Exhibit "B", that it is attempting through its bargaining position to coerce the defendants to agree to relief which could not be reasonably expected after litigation and which ignores the prosecutor's responsibility to stay within statutory and constitutional bounds. The Plaintiff thrusts the Defendants in the position to either agree to the unwarranted provisions required by the Plaintiff or else to go through a costly and protracted trial with its attendant expense.

6. That the Plaintiff and Defendants have settled Count One of the complaint by agreement between them, and therefore all issues between the moving Defendants and the Plaintiff stand resolved and there remains no just reason for delaying the entry of the final judgment against these Defendants in accordance with the proposed form of judgment annexed to this motion as Exhibit "A".

7. By entry of the proposed judgment, both the Plaintiff and Defendants will be spared the ordeal of a costly and protracted trial and the entry of such judgment will be in accordance with the Congressional policy to encourage judgments and decrees in antitrust cases wherein the government is plaintiff and private parties are defendants. See *Twin Ports Oil Co. v. Pure Oil Co., et al.* (D.C.D. Minn. 1939) 26 F. Supp. 366.

8. Defendants ask the Court to enter a judgment in the present case as if all of the allegations in the complaint were proven as true.

/s/ JOHN W. BALL of

ULMER, MURCHISON, KENT,

ASHBY & BALL

850 Florida National Bank

Building

Jacksonville, Florida

Attorneys for Flowers Baking
Company, Inc.

/s/ **M. H. BLACKSHEAR, JR. of**
KING & SPALDING
434 Trust Company of Georgia
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Atlanta 3, Georgia
Attorneys for American
Bakeries Company

/s/ **FRED H. KENT**
DAVISSON F. DUNLAP of
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Attorneys for Southern
Bakeries Company

/s/ **JOHN B. MILLER of**
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& SIMPSON
400 Georgia State Bank Building
Savannah, Georgia
Attorneys for Derst Baking
Company

CERTIFICATE OF SERVICE
(Omitted in printing)

(File endorsement omitted)

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Affidavit of M. H. Blackshear, Jr.—Filed June 11, 1962

IN PERSON APPEARED before the undersigned authority, M. H. BLACKSHEAR, JR., who after being first duly sworn on oath, deposes and says:

I am a partner in the firm of King & Spalding, formerly Spalding, Sibley, Troutman, Meadow & Smith, and that as such I am of counsel for defendant American Bakeries Company in the within case. I also was of counsel for American Bakeries Company in the Criminal Case, Indictment No. 11,677J, returned true by the grand jury on March 6, 1961, in the United States District Court for the Southern District of Florida, Jacksonville Division, against Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc., and Southern Bakeries Company.

290 I conferred with attorneys for the other defendants in the within case and it was agreed by all counsel for these defendants that an effort should be made to settle both Counts I and II of this case and I was authorized to speak for the entire group in such negotiations. I discussed the terms of settlement for Count I by telephone and in person with Henry M. Stuckey, Trial Attorney of the Department of Justice handling this case, and as a result of these negotiations, offered on behalf of all defendants to make settlement of Count I by paying \$44,000. Henry M. Stuckey expressed his personal approval of this offer and stated that he would recommend its acceptance and suggested that I come to Washington for the purpose of concluding a settlement based upon this offer.

Until I arrived in Washington on March 29, 1962, for conference arranged by Mr. Stuckey, settlement of Count II had not been discussed. Upon arrival in Washington on March 29th, Mr. Stuckey advised me that in order to get favorable action on our offer for settlement of Count I, it would be necessary for the defendants to consent to an

injunction on Count II. I stated that while I had hoped that the Government would dismiss Count II on settlement of Count I, I had been authorized by my client and by counsel for all the other defendants to agree to an injunction in accordance with the specific prayers for relief upon Count II. Without seeking to obtain by negotiations any milder decree, I said that all defendants would agree to be so enjoined.

Mr. Stuckey informed me that he had arranged a conference with William D. Kilgore, Jr., Esq., Chief of the Judgments and Judgment Enforcement Section and that an agreement on the injunction must be reached with Mr. Kilgore. When we met with Mr. Kilgore, he had prepared and submitted to me a proposed stipulation and 291 final judgment, copies of which are attached, identified as Exhibits "A" and "B", respectively, and by reference incorporated in this affidavit. I had not previously had any intimation that the Government expected or wished a judgment broader than that prayed on Count I. I consequently informed Messrs. Kilgore and Stuckey that I had no authority from any of the defendants to consent to a broad injunction such as was proposed and if the Government would not accept in settlement a decree granting an injunction as prayed, the conference might as well be broken off as this was the full limit of my authority. Mr. Kilgore was unwilling to recommend such a narrow judgment and, consequently, the conference was terminated.

Acting at the suggestion of Henry M. Stuckey on my return to Atlanta, I drafted a proposed final judgment, copy of which is hereto attached, marked Exhibit "C" and this judgment was submitted to Henry M. Stuckey on April 12th accompanied by letter, copy of which is hereto attached, marked Exhibit "D".

By letter dated April 17, 1962, my proposed final judgment was acknowledged by William D. Kilgore, Jr. of the Department of Justice who countered by offering to recommend settlement on the basis of proposed final judgment, copy of which is marked Exhibit "E", attached hereto and incorporated herein.

I acknowledged this letter and draft by letter to William D. Kilgore, Jr., dated April 23, 1962, copy of which is marked Exhibit "F", attached hereto and incorporated herein.

Subsequently, deponent was informed that the Department of Justice was willing to settle Count I for \$44,000 without a settlement of Count II and settlement of Count I has now been completed upon that basis.

292 At the same time, deponent was informed through Henry M. Stuckey that the Department of Justice was willing to modify its last draft of proposed final judgment in such manner as to make it clear that these manufacturers of bakery products would not be prohibited from printing the retail price for each item upon the package and also to provide that the certification of no collusion on Government bids be limited to a period of three (3) years following the entry of judgment.

Acting for all defendants in Criminal Case No. 11,677J, I undertook my negotiations with Henry M. Stuckey on November 18, 1960, to determine what civil demands the Government intended to make upon these defendants. Deponent was then informed that no civil action was contemplated. Acting in part upon this representation, the defendants decided to tender a plea of nolo contendere and did tender such plea which was accepted by this Court. The Government objected to the acceptance of these pleas and through counsel made a very full statement with respect to the Government's position. Such statement did not, however, indicate that civil action of any type was contemplated by the Government and deponent was entirely unaware that any such action was, in fact, planned until this suit was filed on July 21, 1961.

/s/ M. H. BLACKSHEAR, JR.
M. H. Blackshear, Jr.

Sworn to and subscribed before
me this 6th day of June, 1962.

JOYCE C. JACKSON
Notary Public

Notary Public, Georgia State at Large
My Commission Expires Oct. 9, 1964

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Exhibit "A" to Affidavit

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

Civil No. 4735-Civ.-J

UNITED STATES OF AMERICA, *Plaintiff,*

v.

**WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY,
DERST BAKING COMPANY, FLOWERS BAKING COMPANY,
INC. and SOUTHERN BAKERIES COMPANY, *Defendants.***

STIPULATION

It is stipulated by and between the undersigned parties, by their respective attorneys, that:

(1) The said parties consent that a Final Judgment in the form hereto attached and filed herewith may be filed and entered by the Court at any time after the expiration of thirty (30) days following the date of filing of this Stipulation without further notice to any party or other proceedings, either upon the motion of any party or upon the Court's own motion, provided that plaintiff has not withdrawn its consent as provided herein;

(2) The plaintiff may withdraw its consent hereto at any time within said period of thirty (30) days by serving notice thereof upon the other parties hereto and filing said notice with the Court;

(3) In the event plaintiff withdraws its consent hereto, this Stipulation shall be of no effect whatever in this or any other proceeding and the making of this Stipulation shall not in any manner prejudice any consenting party in any subsequent proceedings.

Dated: , 1962

For the Plaintiff:

LEE LOEVINGER

Assistant Attorney General

W. D. KILGORE, JR.
MARGARET H. BRASS

HENRY M. STUCKEY
WILLIAM P. CASSEY

*Attorneys, Department of
Justice*

For the defendants:

AMERICAN BAKERIES COMPANY

By M. H. BLACKSHEAR, JR.
KING & SPALDING

DERST BAKING COMPANY

JOHN B. MILLER

HITCH, MILLER, BECHTOLD & SIMPSON

SOUTHERN DAIRIES COMPANY

By: JOHN H. BOMAN, JR.

HANSELL, POST, GARDNER,
BRANDON & DORSEY

WARD BAKING COMPANY and FLOWERS
BAKING COMPANY, INC.

By: FRED KENT

By: JOHN W. BALL

By: DAVISSON F. DUNLAP

All members of the firm of ULMER,
MURCHISON, KENT, ASHBY & BALL

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APPENDIX

AFFIDAVIT

The undersigned hereby certify to their best knowledge and belief that:

(1) The bid to
(name of recipient of bid) dated
has not been prepared by
(name of defendant) in collusion with any other seller
of bakery products, and

(2) The prices, terms or conditions of said bid have
not been communicated by the undersigned nor by any
employee or agent of
(name of defendant), to any other seller of bakery
products and will not be communicated to any such
seller prior to the official opening of said bid,

in violation of the Final Judgment in Civil No. 4735-Civ.-J entered by the United States District Court for the Southern District of Florida, Jacksonville Division, on 1962.

Dated:, 1962

Signature of person responsible
for the preparation of the bid

Signature of person supervising
the above person, where feasible

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Exhibit "B" to Affidavit

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION
Civil No. 4735-Civ.-J

UNITED STATES OF AMERICA, *Plaintiff,*

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY,
DERST BAKING COMPANY, FLOWERS BAKING COMPANY,
INC. and SOUTHERN BAKERIES COMPANY, *Defendants.*

FINAL JUDGMENT.

Plaintiff, United States of America, having filed its complaint herein on July 21, 1961, and the plaintiff and the defendants by their respective attorneys having severally consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein;

Now, THEREFORE, before the taking of any testimony and the defendant Derst Baking Company having heretofore been dismissed as a defendant under Count I of the complaint herein, and plaintiff and the remaining defendants having jointly moved to dismiss Count I, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

Count I of the complaint is hereby dismissed. This Court has jurisdiction of the subject matter hereof and of the parties consenting hereto, and Count II of the complaint

states a claim upon which relief may be granted against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

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II

The provisions of this Final Judgment applicable to any defendant shall apply also to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

III

Each of the defendants is enjoined and restrained from directly or indirectly entering into, adhering to, or claiming or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other person to:

(A) Eliminate or suppress competition in the manufacture or sale of any products;

(B) Establish, maintain, stabilize or fix prices or other terms or condition for sale of any products to any third person;

(C) Submit noncompetitive, collusive or rigged bids, or quotations; or

(D) Allocate, divide or rotate customers.

IV

Each defendant is enjoined and restrained from directly or indirectly:

(A) Urging or suggesting to any seller of bakery products the quotation or charging of any price or other terms or condition of sale;

(B) Disclosing to or exchanging with any seller of bakery products the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation.

V

Each defendant is ordered and directed to submit a sworn statement in the form set forth in the Appendix hereto with each bid for bakery products submitted 298 to any governmental agency (unless such agency requires the submission of a different type of sworn statement to the same effect), such sworn statement to be signed by a principal officer of said defendant and by the person actually responsible for the preparation of said bid.

VI

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings 299 for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

VII

Jurisdiction is retained for the purpose of enabling any of the parties consenting to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

Dated:, 1962

.....
United States District Judge

300

Exhibit "C" to Affidavit

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 4735-Civ.-J

UNITED STATES OF AMERICA, *Plaintiff,*

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY,
DERST BAKING COMPANY, FLOWERS BAKING COMPANY,
INC. and SOUTHERN BAKERIES COMPANY, *Defendants.*

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein in two Counts on July 21, 1961, and the defendants, Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company, having appeared and filed their answers to such complaint denying the substantive allegations of both Counts thereof, and the plaintiff and the defendants by their respective attorneys having severally consented to the entry of this final judgment, without trial or adjudication of any of the issues of fact or law herein and before the taking of any testimony;

NOW, THEREFORE, Derst Baking Company having been dismissed from Count I, the plaintiff and the remaining

defendants in Count I after the dismissal of Derst Baking Company, having jointly moved the Court to dismiss Count I, it is hereby

ORDERED, ADJUDGED AND DECREED;

That Count I of the complaint be and it is hereby dismissed as to Ward Baking Company, American Bakeries Company, Flowers Baking Company, Inc. and Southern Bakeries Company, with prejudice.

301 The plaintiff and the defendants by their respective attorneys having severally consented to the entry of this final judgment on Count II without trial or adjudication of any of the issues of fact or law therein and before the taking of any testimony, it is hereby

ORDERED, ADJUDGED AND DECREED upon Count II of the complaint as follows:

I.

This Court has jurisdiction of the subject matter of Count II hereof and of the parties named in said Count and said Count II of the complaint states a claim upon which relief may be granted against the defendants under § 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" commonly known as the Sherman Act, as amended.

II.

As used in this final judgment, "bakery products" means bread and rolls.

III.

The provisions of this final judgment applicable to any defendant shall apply also to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this final judgment by personal service or otherwise.

IV.

Each of the defendants is enjoined and restrained from directly or indirectly entering into, adhering to, or claim-

ing or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other person to:

302 (a) Submit noncompetitive, collusive or rigged bids, or quotations for supplying bakery products to United States of America, its agencies and instrumentalities, or

(b) Allocate, divide or rotate the business of supplying bakery products to United States of America, its agencies or instrumentalities.

V.

Each defendant is enjoined and restrained from directly or indirectly disclosing to or exchanging with any seller of bakery products the intention to submit or not submit a bid or quotation for supplying bakery products to United States of America, its agencies or instrumentalities, the fact that such a bid or quotation has or has not been submitted or made, or the content or terms of any such bid or quotation.

VI.

Each defendant is ordered and directed, for a period of three years after the date of entry of this final judgment, to submit a sworn statement in the form set forth in the Appendix hereto with each bid for bakery products submitted to the United States of America or any of its agencies or instrumentalities (unless such agency or instrumentality requires the submission of a different type of certificate or sworn statement to the same effect), such sworn statement to be signed by the person actually responsible for the preparation of said bid.

VII.

For the purpose of securing compliance with this final judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

303 (a) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to the supplying of bakery products to any of the matters contained in this final judgment; and

(b) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters contained in this final judgment.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendant shall submit such written reports with respect to supplying bakery products to any Naval installation in the Jacksonville area.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this final judgment in which the United States is a party or as otherwise required by law.

VIII.

Jurisdiction is retained for the purpose of enabling any of the parties consenting to this final judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this final judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

Dated:, 1962.

.....
United States District Judge

April 12, 1962

Mr. Henry M. Stuckey
Antitrust Division
Department of Justice
Washington 25, D. C.

Re: U.S.A. v. Ward Baking Company, et al
No. 4735-Civ-J, USDC SD Florida

Dear Henry:

In addition to the original of this letter addressed as set out, I am sending a copy with copy of enclosures, marked "Personal", and addressed to the SEC South Building with the hope that one or the other of these letters will be in your hands by Friday, April 13th.

I enclose draft of proposed final judgment embodying terms on which I feel sure the defendants will be willing to make a settlement of this case. All of the attorneys are in accord but clearance with two of the defendants has not been completed as this is being written. I expect the okay from these two defendants either today or tomorrow and feel so sure that it will be forthcoming that I am sending forward our proposed judgment and will call you as soon as the remaining clearances have been received.

This offer to settle is submitted with the understanding that its acceptance by the Government will constitute a complete and final settlement of all the Government's claims growing out of the transaction described in this suit. The offer is also made upon the assumption that no other criminal prosecutions are presently contemplated by the Government against any corporation or individual on account of either the incidents involved in this suit or the incidents which formed the basis of indictment number

11,676-J which we have referred to as the alleged
305 general price conspiracy indictment. The offer is also made with the understanding that the Government is not presently contemplating any further civil action based on the alleged general price conspiracy, indictment number 11,676-J. If I am wrong on either of these assumptions, please let me know and disregard the offer of settlement. If my assumptions are correct and if we can agree

upon a settlement, then we would like an understanding with you that when the proposed consent decree is submitted to Judge Simpson, you will then state that the Government plans no further action, civil or criminal. The five defendants, Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company offer \$44,000 in full settlement with prejudice of the monetary claims of the Government contained in Count I. As you will see from the proposed draft judgment, this settlement of Count I will result in a dismissal of the Count as to all defendants but Derst, with prejudice. A letter will be written to the attorney for Derst by the Assistant Attorney General for the Antitrust Department agreeing not to reinstitute against Derst the charges contained in Count I. Derst, of course, is to be dismissed from Count I for want of venue if it has not already been so dismissed.

Settlement of Count II will be by consent injunction according to the terms of the enclosed draft final judgment. I believe this draft is self-explanatory.

If necessary, I will come to Washington but I hope that the trip will not be necessary and that the Government can see its way clear to accept the proposals that we have here outlined.

With personal regards, I am

Very truly yours,

M. H. BLACKSHEAR, JR.

MHBjr:sl
Enclosure

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.WDK.
60-70-52

April 17, 1962

M. H. Blackshear, Jr., Esquire
King and Spalding
434 Trust Company of Georgia Bldg.
Atlanta 3, Georgia

Re: United States v. Ward Baking Company, et al.,
No. 4735-Civ.-J, S.D. Florida

Dear Mr. Blackshear:

Reference is made to your letter of April 12, 1962 to Mr. Stuckey forwarding a proposed judgment in the above-captioned case.

I have carefully reviewed your draft judgment and I am happy that you have been able, at least to a limited extent, to meet the position which I had taken as embodied in the draft judgment given to you at our recent meeting.

In order to assure that we have explored all avenues looking toward a possible consent judgment in this action, I have taken the liberty of revising my draft judgment also in an endeavor to meet your position or come as close thereto as possible. I am thus forwarding to you four copies of a revised draft judgment which I am willing to recommend to the Assistant Attorney General.

You will note that in my draft judgment I have not included a definition of "bakery products" as I do not consider it appropriate that the judgment should be limited to bread and rolls. See, e.g., *United States v. U. S. Gypsum*, 340 U.S. 76. You will note that in Sections IV and V I have limited the coverage of the prohibitions in an attempt to meet your position.

307 With respect to the various assurances set forth in your letter, I regret that I am unable at this stage to tell you the Division's position in this regard; however, I am willing to recommend to the Assistant Attorney General that the draft letter heretofore given to you to go to

counsel for Derst Baking Company be expanded to include an official statement that the Department does not presently intend filing any criminal or civil proceedings with respect to the various transactions out of which the Department's recent cases evolved.

If you would care to discuss any of these matters, please do not hesitate to call upon me.

Sincerely yours,

WM. D. KILGORE, JR.
William D. Kilgore, Jr.
*Chief, Judgments and Judgment
Enforcement Section
Antitrust Division*

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Exhibit "F" to Affidavit

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 4735-Civ.-J

UNITED STATES OF AMERICA, *Plaintiff,*

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY,
DERST BAKING COMPANY, FLOWERS BAKING COMPANY,
INC. and SOUTHERN BAKERIES COMPANY, *Defendants.*

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on July 21, 1961, and the plaintiff and the defendants by their respective attorneys having severally consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein;

NOW, THEREFORE, before the taking of any testimony and the defendant Derst Baking Company having heretofore been dismissed as a defendant under Count I of the complaint herein, and plaintiff and the remaining defendants having jointly moved to dismiss Count I, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

Count I of the complaint is hereby dismissed with prejudice.

II

This Court has jurisdiction of the subject matter hereof and of the parties consenting hereto, and the complaint states a claim under Count II upon which relief may be granted against the defendants under Section 1 of 309 the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

III

The provisions of this Final Judgment applicable to any defendant shall apply also to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

Each of the defendants is enjoined and restrained from directly or indirectly entering into, adhering to, or claiming or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other person to:

(A) Establish, maintain, stabilize or fix prices or other terms or condition for sale of any bakery products to any third person;

(B) Submit noncompetitive, collusive or rigged bids, or quotations for the sale of bakery products;

(C) Allocate, divide or rotate customers for the sale of bakery products.

V

Each defendant is enjoined and restrained from directly or indirectly:

(A) Urging or suggesting to any seller of bakery products the quotation or charging of any price or other terms or condition of sale of bakery products;

(B) Disclosing to or exchanging with any seller of bakery products the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation.

310

VI

Each defendant is ordered and directed for five (5) years from the date of entry of this Final Judgment to submit a sworn statement in the form set forth in the Appendix hereto with each bid for bakery products submitted to any governmental agency (unless such agency requires the submission of a different type of sworn statement to the same effect), such sworn statement to be signed by a principal officer of said defendant and by the person actually responsible for the preparation of said bid.

VII

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, the said defendant shall submit such written

reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

VIII

Jurisdiction is retained for the purpose of enabling any of the parties consenting to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction of carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

Dated:, 1962

.....
United States District Judge

312

APPENDIX

AFFIDAVIT

The undersigned hereby certify to their best knowledge and belief that:

(1) The bid to
(name of recipient of bid) dated
has not been prepared by
(name of defendant) in collusion with any other seller
of bakery products, and

(2) The prices, terms or conditions of said bid have
not been communicated by the undersigned nor by
any employee or agent of

(name of defendant), to any other seller of bakery products and will not be communicated to any such seller prior to the official opening of said bid,

in violation of the Final Judgment in Civil No. 4735-Civ.-J entered by the United States District Court for the Southern District of Florida, Jacksonville Division, on, 1962.

Dated:

.....
Signature of person responsible
for the preparation of the bid

.....
Signature of person supervising
the above person, where feasible

(File endorsement omitted)

313 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

**Affidavit—Filed Before Me June 14, 1962—Bryan Simpson,
U. S. District Judge**

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss:

HENRY M. STUCKEY, being first duly sworn, deposes and says: I am employed as a trial attorney in the Antitrust Division of the Department of Justice at Washington, D. C., and have been assigned to duties connected with the preparation of the above-captioned civil antitrust case and criminal cases numbered 11,676-J and 11,677-J filed in this Court on March 6, 1961. In the course of performing these duties I have had occasion to confer with counsel for the defendants by telephone and in person, including M. H. Blackshear, Jr.

With respect to the last paragraph of affidavit of M. H. Blackshear, Jr., sworn and subscribed to on June 6, 1962

and to be filed in this Court on June 14, 1962, which states in part:

Acting for all defendants in Criminal Case No. 11,677-J, I undertook by negotiations with Henry M. Stuckey on November 18, 1960, to determine what civil demands the Government intended to make upon these defendants. Deponent was then informed that no civil action was contemplated.

314 deponent says:

1. That no negotiations to "determine what civil demands the Government intended to make upon these defendants" took place on November 18, 1960 or at any other time up to July 21, 1961 between deponent and M. H. Blackshear, Jr.

2. That M. H. Blackshear, Jr. was never informed by deponent "that no civil action was contemplated" in this matter on November 18, 1960 or at any other time up to July 21, 1961.

Deponent further says that Criminal Cases Numbered 11,676-J and 11,677-J were filed on March 6, 1961 and Civil Case No. 4735-Civ-J was filed on July 21, 1961. Therefore, on November 18, 1960 there was no case, criminal or civil, pending against these defendants which could possibly have been the subject of any conversation or negotiations between deponent and M. H. Blackshear, Jr. Deponent further says that he was ordered to prepare and file Civil Case No. 4735-Civ-J sometime between April 11 and May 1, 1961 and that prior thereto he had no knowledge whether the Department would or would not file a "civil demand" against the defendants.

/s/ HENRY M. STUCKEY
Henry M. Stuckey

Subscribed and sworn to before
me this 13th day of June 1962

GEORGE T. MCCARTER
Notary Public

District of Columbia
My Commission Expires
Feb. 28, 1967

(File endorsement omitted)

315

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 4735-Civil-J

UNITED STATES OF AMERICA

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY,
DERST BAKING COMPANY, FLOWERS BAKING COMPANY,
INC., and SOUTHERN BAKERIES COMPANY, *Defendants.*

**Excerpts From Transcript of Proceedings on Order to
Show Cause**

Before the Honorable Bryan Simpson, Judge of the above
Court, in Chambers, at Jacksonville, Florida, on
Thursday, June 14, 1962, commencing at 9:45 A.M.

JOSEPH A. SHERIDAN,
Official Reporter.

316

Appearances

For the Government:

HENRY M. STUCKEY, Esquire
Department of Justice,
Washington, D. C.

For the Defendants:

MESSRS. ULMER, MURCHISON, KENT, ASHBY & BALL

By: JOHN W. BALL, Esquire, and

DAVISSON F. DUNLAP, Esquire.

Representing Ward Baking Company, and
Flowers Baking Company, Inc.

MESSRS. KENT and SPALDING

434 Trust Company of Georgia Building,
Atlanta, Georgia.

By: M. H. BLACKSHEAR, Jr., Esquire.

Representing American Bakeries Company.

MESSRS. HITCH, MILLER & BECKMANN
P.O. Box 2126,
Savannah, Georgia.

By: JOHN B. MILLER, Esquire.
Representing Derst Baking Company.

MESSRS. CRENCHAW, HANSELL, WARE, BRANDON & DORSEY
310 Fulton Federal Building,
Atlanta 3, Georgia.

By: JOHN B. BOMAN, JR., Esquire.
Representing Southern Bakeries Company.

321

Argument by Mr. Stuckey

Mr. Stuckey:

As Your Honor recalls, the Government presented to the Court on May 8th its proposed Consent Decree and at the same time the defendants proposed their Consent Decree.

The Government objects to the filing or entry of the defendants' Decree on three principal grounds. I might say that these objections also go to the Decree that I was served with this week, the new Amended Decree which has been filed with the Court.

322 **The Court:** I don't believe I have that.

Mr. Dunlap: Yes, sir. I believe it's either under there with the affidavit there; they put the affidavit on top. There is a Motion for Leave to File the Amended because, under the Rules, I couldn't file it. It was in the form of a Motion to the Court for Leave to File Amended Motion.

Mr. Stuckey: I think it's Exhibit—

The Court: It may be an exhibit to the affidavit.

Mr. Dunlap: No, sir. The affidavit was an exhibit to it.

Mr. Stuckey: It's Exhibit C, Your Honor.

Mr. Dunlap: If I might straighten out the pleadings, Your Honor: There was a Motion to move the Court for leave to file amended Motion for entry of Consent Judgment.

The Court: Well, I'm just going by what the Clerk has filed here. There was your Motion for Entry of
 323 **Consent Judgment on the 8th of May.**

Mr. Dunlap: Yes, sir.

The Court: And the Stipulation—

Mr. Dunlap: Yes, sir.

The Court: —which was—I don't understand what the Stipulation has to do about reply briefs. Is this in the right case?

Mr. Dunlap: Yes, sir. That was the brief. If you will recall, Your Honor, we had a time limitation on the brief of the respondents in relationship to the last legal point which was left unresolved by the settlement of Count I, and that was, namely, the Motion to Dismiss because—on the pleadings—on the ground that it did not properly state grounds pleadingwise on which to grant the injunctive relief. And you'll recall, Your Honor, we decided to extend the time for us to file those briefs since we were having this Rule to Show Cause hearing coming up. That was an Order to further postpone the time for our filing briefs.

324 The Court: I thought Count I was cleaned—

Mr. Dunlap: This is on Count II, Your Honor. After Count I, the only thing left—if you will recall, Your Honor, we had a full argument on Counts I and II and then, when we settled Count I, most of that argument went out the window.

The Court: Yes.

Mr. Dunlap: Because most of it related to Count I. However there was one point left as to Count II relating to the Motion to Dismiss Count II on the ground that there had not been sufficient grounds alleged in the Complaint in order to go forward on the injunctive relief, and that was the only legal point that was left in the case. Your Honor had given us time to file briefs on the whole matter at the end of that argument. Then we came and settled Count I and that left only this one point to be briefed, and, Your Honor, at that time, at the last hearing, we then agreed to extend the time for the filing of that brief on the Motion to Dismiss.

The Court: Isn't that largely mooted by what we did on May 8?

325 Mr. Stuckey: Most of it is as a practical matter, I would say; yes, sir.

Mr. Dunlap: We did extend the time at that time.

The Court: You did. That Stipulation was entered into; that's what I ran across there but I don't—

Mr. Dunlap: I believe the Court suggested it at that time, or we—but we brought up the matter and it was agreed that we would extend it. That's my recollection.

Mr. Stuckey: I called the Judge on the telephone and told him we were negotiating on Count II.

Mr. Dunlap: Yes.

The Court: This was entered May 8, at the time you were before me. Isn't May 8 the date you were before me?

Mr. Dunlap: Yes, sir. This was the date of the argument and that was in our total conference.

326 The Court: I guess that was simply to preserve it—

Mr. Dunlap: Yes, sir.

The Court: —if all negotiations fell down.

Mr. Dunlap: That's correct.

Mr. Stuckey: I think our briefs were due May the 11th and we had this other argument on May 8th.

Mr. Dunlap: I believe that's correct.

The Court: Simply to preserve it.

Going ahead with what I started to say, there is a paper of May 8th. I quashed the service as to Derst.

Mr. Stuckey: That's correct.

The Court: And Derst was dismissed from Count I.

Mr. Dunlap: Yes, sir.

The Court: Then I entered the Order to Show Cause, and then the plaintiff files his objections and memorandum, statement of its objections to the Show Cause Order and supporting memorandum. And then there is Mt. Blackshear's affidavit, with attached exhibits, and that's all. There isn't any Motion for Leave to File any Amended Decree.

Mr. Dunlap: Your Honor, I sent such a Motion over and I served such a Motion on Mr. Stuckey and on the U.S. Attorney. I don't know whether it was not filed or loose but it was sent over at the same time. It was sent over at the same time.

Mr. Roman: Do you have a copy of it there?

Mr. Dunlap: I have a copy of it here, Your Honor.

Mr. Stuckey: Here is my copy, if you would like to see it.

The Court: I want to be sure it is filed.

Mr. Stuckey: My letter says it was—

Mr. Dunlap: May I approach?

The Court: Sure.

328 Mr. Dunlap: This was filed all at the same time.
(Indicating)

The Court: The same as this?

Mr. Dunlap: Yes, sir.

The Court: Same as June 11?

Mr. Dunlap: Yes, sir. See, we had the Motion, because under the Rules I can't file an Amended Motion without the Court's permission, so we amended our Motion for entry of judgment. We offered the proposed judgment and we put, as an exhibit, this affidavit on it and I served all of those.

The Court: All we got was the affidavit, the affidavit and the attachments.

Mr. Dunlap: Yes, sir. And I served it on Mr. Stuckey by mail and also the U.S. Attorney.

The Court: At any rate, whether we can find it in the Clerk's office or not, he is on record as—he is on notice, rather, as to what—

329 Mr. Dunlap: Yes, sir.

The Court: —as to what judgment you all now propose.

Mr. Dunlap: That's correct.

The Court: That's what it comes down to, I believe that's fair to say, isn't it?

Mr. Stuckey: That's essentially correct.

The only trouble is, Your Honor, I came down to argue the other judgment, which Your Honor ordered me to show cause why it should not be entered, and I have had this new judgment one day.

The Court: Well, is there any change?

Mr. Stuckey: I wouldn't say there is any substantial change.

Mr. Dunlap: Your Honor, there is a substantial change. The substantial change is that it makes quite a few points raised in the Government's objections, namely, we have enlarged in the judgment the term "bread and rolls" to include all bakery products; and we have enlarged

330 tremendously the scope of the geographical effect of this proposed judgment to all Government installations, period.

The Court: Not to the general public?

Mr. Dunlap: No, sir, but to all Government—

The Court: You are still at odds over the general public?

Mr. Dunlap: Yes, sir.

The Court: Is that what it comes down to?

Mr. Dunlap: That's correct.

The Court: The difference between your two views, whether it should be—

Mr. Dunlap: I would say essentially that's the main difference. There may be some smaller differences; is that correct, Henry?

The Court: Well now, there was this right to enter and inspect. Someone had it—you had it three years
331 and he had it five the other time.

Mr. Dunlap: That's still a difference there.

The Court: There's still a difference there?

Mr. Dunlap: Three and five.

Mr. Stuckey: That was the affidavit, Your Honor.

The Court: Here is your Motion and it is file-marked the 11th.

Mr. Dunlap: Yes, sir.

Mr. Stuckey: Your Honor, I would also like to file an affidavit at this time.

The Court: Is that in line with the statement you just made?

Mr. Stuckey: Yes, sir.

The Court: All right. I was going to take it as a statement and treat it as an affidavit for all purposes. I mean, it's—

332 Mr. Stuckey: I have just prepared one.

The Court: —it's a statement seriously made.

Mr. Stuckey: Shall I proceed, Your Honor?

The Court: Yes, sir, I think so.

Mr. Stuckey: The three principal objections that the Government has to the defendants' proposed Decree are these:

1. The Government objects to the failure of the judgment to adjudge that the defendants have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in the sale of bakery products, in violation of Section 1 of the Sherman Act.

2. The Government also objects to confining the scope of the Injunction to bids for supplying bread and rolls to United States Naval installations in the Jacksonville, area.

3. The Government also objects to limiting the requirement of Section VI, that bids be accompanied by sworn statements of non-collusion, to a three-year period.

333 On May 8, 19—

The Court: What is the Government's position on this non-collusion matter?

Mr. Stuckey: We have a five-year provision.

The Court: Five year?

Mr. Stuckey: Yes, sir.

The Court: Well now, those—in other words, there are these two things: The dispute as to the three and five-years; (1) the right to enter and inspect.

Mr. Stuckey: No, sir, that's not enter and inspect; it's just—

The Court: I understand. This is requiring a sworn statement to accompany bids.

Mr. Stuckey: Yes, sir.

The Court: But wasn't there— isn't this right to—maybe I'm—

334 Mr. Stuckey: I don't recall any time period on that, Your Honor.

Mr. Dunlap: There is no time limitation on the period of inspection.

The Court: In either one?

Mr. Dunlap: No, sir.

The Court: In other words, you both agree that the Government be given that right by the injunction?

Mr. Dunlap: Yes, sir. There is no time limitation in either the one we proposed or the one that they propose.

The Court: All right. The three and five is as to the—

Mr. Stuckey: Affidavit.

The Court:—requirement of sworn statements.

Mr. Dunlap: Accompanying bids, yes, sir.

335 The Court: Non-collusive statements?

Mr. Dunlap: Yes, sir.

Mr. Stuckey: Yes, sir.

The Court: Well now, you go ahead. You have another objection, I think, haven't you?

Mr. Stuckey: Those are the three principal objections and I wanted to argue the legal points of them, Your Honor.

Mr. Dunlap: I believe those are set forth in the Statement of Objections, aren't they, Henry?

Mr. Stuckey: Yes.

Mr. Boman: And dated May 31st, 1962.

Mr. Stuckey: And the brief also accompanied that.

The Court: Well, as I understand it though, he is now willing to—I thought you had an objection as to geographical—

336 Mr. Stuckey: Yes, sir.

The Court: —limitations.

Mr. Stuckey: Yes, sir, that is correct.

The Court: Well now, that isn't one of these three you have.

Mr. Dunlap: That's Number 2; I think it's Number 2 on your statement, if you will read that, Henry.

Mr. Stuckey: Number 2, Your Honor, is the geographical area. It says:

"Jacksonville area."

The Government objects to confining the scope of the injunction to bids for supplying bread and rolls to United States Naval installations in the Jacksonville area.

The Court: Well, as to that, he now says he is willing to have it all Government installations, all over the world.

Mr. Ball: And for all bakery products.

337 The Court: And for all bakery products. So that comes down to a question of whether, it seems to me, whether the Decree should restrict their dealings with the general public as well as with the Government, or whether it should be limited to dealing with Government military and naval organizations.

Mr. Stuckey: On that point, yes, sir.

The Court: On that point. All right.

In other words, I think we would save time by recognizing the concessions they have made, since your objections were filed.

Mr. Stuckey: Yes, sir.

The Court: They have met some of your objections.

Mr. Stuckey: Yes, sir.

The Court: And let's view it as it is now instead of as it was May 31.

Mr. Stuckey: I was trying to do that.

338 The Court: All right. Thank you.

Mr. Stuckey: They have corrected some part of the first argument that I have in that this was a consent judgment. I don't believe the word "consent" appears in their present judgment filed this week.

Mr. Dunlap: That's correct.

Mr. Stuckey: Is that correct?

Mr. Dunlap: That's right. And that, Your Honor, was based on the fact that in *Brunswick-Balke* also the word "consent" was not used and that fact is commented on in the write-up of this case in the Anti-Trust and Trade Regulations we just received this morning. They noted in that write-up that there had been a difference in the *Brunswick-Balke* in that, in that case, they merely moved for an entry of proposed judgment, avoiding the consent judgment label used by the bakeries in the Florida case.

I am reading from their comments.

339 Further, we have eliminated the "consent" portion of the judgment in the new proposal, which is listed as judgment.

The Court: Who are these people that are commenting on it?

Mr. Dunlap: This is the Anti-Trust—

The Court: They are commenting on it and we are here right on the scene.

Mr. Dunlap: This is the Bureau of National Affairs, Anti-Trust and Trade Regulations Report, from which we got the full text of the *Brunswick-Balke* case that we furnished Your Honor.

The Court: Yes.

Mr. Boman: What is the date of that?

Mr. Dunlap: It came in this morning; it's dated June 12, 1962.

The Court: Well, one of you, one side or the other, must have sent them this other for them to comment on.

Mr. Dunlap: I can say the defendants did not,
340 Your Honor. I don't know whether the Anti-Trust Division did or not.

Mr. Stuckey: I'm sure I did not.

The Court: I don't know, they may have read about it in the paper and got copies from the Clerk; I don't know.

Mr. Dunlap: That's right, Your Honor.

The Court: All right, sir.

Mr. Stuckey: Your Honor, in the absence of facts describing an admitted or adjudicated violation, the Court has no record on which it can determine the scope of relief needed to prevent further violations.

There is no precedent to support the granting of the defendants' proposed Motion. There is precedent, however, against it.

On April 20, 1960, Judge Wyzanski dismissed a similar suggestion made by the defendants in the case of *United States vs. Lake Asphalt and Petroleum Company of Massachusetts, et al.*, Civil Action No. 59-786-W, District of Massachusetts, as "perposterous," saying:

341 "It seems to be preposterous for me to purport to act on the consent of one side over the objection of the other side without making findings. It seems to me to be an absolute violation of every rule that I ever heard of."

On June 17, 1960, the Court, in *United States vs. True Temper Corporation, et al.*, Civil Action No. 58-C-1159, Northern District of Illinois, granted the Government's Motion to Strike the defendant's Answer which denied the substantive allegations, but stated:

"For purposes of this case only, it will not contest these allegations."

And appended to the Answer a tendered formal judgment.

In only one case, to the Government's knowledge, has a court ever, in the absence of any admission of liability, testimony, findings of fact, or consent of the parties, entered a judgment over the objection of one of the parties. In that case, *United States vs. Brunswick-Balke-Collender, et al.*, Civil No. 59-C-163, Eastern District of Wisconsin, the Court, on March 27, 1962, at the request of the defendants entered a judgment against the defendants and did so over the objections of the Government. The Government has not yet filed a notice of appeal.

342 However, if appealed, whether the Supreme Court sustains the lower court or not, that case offers no

precedent for the instant case. In that case the judgment was entered as a result of extensive negotiations between the Government and the defendants which culminated in a judgment that went beyond the relief prayed for in the complaint. In fact, the defendants in that case agreed to all injunctive relief requested by the Government. The defendants objected only to a provision that would require them to admit liability and concede guilt in any treble-damage action brought by any State agency based on the same alleged conspiracy. The Court sustained that objection.

In entering the judgment without that provision, the Court granted injunctive relief of the precise breadths sought by the Government.

It is therefore obvious that the Brunswick case is not a precedent for the defendants' motion. They are now seeking to compel the Government to accept narrower injunctive relief than the Government believes the facts warrant. The Government has no objection to a resolution of this issue by the Court upon a proper factual

343 record. The Government insists only that it cannot be resolved by a comparison of the complaint and the proffered injunction, as the defendants would have the Court resolve it.

The granting of the defendants' motion would not be in the public interest. In addition to the fact that what the defendants are requesting violates every known rule of law or equity governing the entry of judgments, there are strong reasons of public policy why the judgment proposed by the defendants should not be entered in this case. In the Government's opinion the judgment proposed by the defendants shows on its face that it will not prevent future violations similar to the one charged in the Complaint.

First, the judgment fails to give what the Government would be sure of getting if it went to trial and won, that is, in addition, an adjudication of guilt.

The value of such an adjudication is indicated by the lengths to which the defendants have gone to avoid it. In this case and in a companion criminal case, the defendants are and were charged with illegally combining and conspiring to fix the price of bread and rolls sold to the Naval

installations in the Jacksonville, Florida, area. The
 344 Government stands ready to prove the charge.

In the criminal case the defendants have escaped an adjudication usable in this case by pleading nolo contendere. Now, still unwilling to change their denials to Count II in the civil case but without offering to prove their innocence, they are asking the Court, in the absence of any facts, to enter a judgment over the Government's objection that would prevent any adjudication which the Government or any other party could use against them in this or any other litigation.

Second, in addition to an adjudication of guilt, the trial would result in the public exposure of the defendants' unlawful activities and such exposure is extremely valuable to the Government in connection with its efforts to enforce the Anti-Trust Laws and to engender respect for those laws by the community.

Third, if the case were to be tried, the Government would be afforded the opportunity both at the trial and at the hearing on relief to offer evidence in support of its claim for injunctive relief broader than that offered by defendants' proposed judgment. It should be noted that defendants' proposed judgment ignores Paragraph (C) of the prayer requesting that the plaintiff have such

345 further, general, and different relief as the nature of the case may require and the Court may deem appropriate in the premises. Even if there were no separate hearing on relief, if the Government's evidence showed a need for broader relief than that offered by the defendants, and we submit that it would, the Government would be entitled to such relief regardless of the specifics of its prayer.

Rule 54(c) of the Federal Rules of Civil Procedure provides in part as follows:

"Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

While the Government may agree to a consent settlement of a civil case, it cannot properly agree to a consent

judgment which provides narrower injunctive relief than the nature of the violation charged warrants.

The charge here is bid-rigging in selling particular Government installations. The defendants having been caught in the act of defrauding the Naval installations in the Jacksonville area, it is extremely unlikely that that offense would be reflected in the same place in the same manner. The defendants have offered no proof which would justify the Court in holding that a repetition of the offense in another place with respect to other products sold by them is unlikely. If the injunction is to serve any practical purpose, it must be broad enough to prevent such violations.

It is therefore the Government's position that the granting of the defendants' motion in this case would be contrary to sound judicial policy as well as the public interest in Anti-Trust enforcement.

The Government has offered to settle this case by the entry of a judgment which, in the Government's opinion, will serve the public interest. A copy of this judgment is on file with the Court. As the Court will notice, the proposed judgment is broader than that of the defendants in the following respects:

Section IV (B) and (C) of the Government's proposed judgment is comparable to Section IV (A) and (B) of the defendants' proposed judgment, with the exception that in the Government's proposed judgment the injunction against submitting rigged bids and allocating and rotating business applies to bakery products in general, rather than just "bread and rolls", and is not confined merely to the Jacksonville area.

347 In addition, Section IV (A) of the Government's proposed judgment contains a general injunction against conspiring to fix the price of bakery products sold to any third party; whereas defendants' proposed judgment relates solely to sales to United States Naval installations in the area.

Section V (B) of the Government's proposed judgment is comparable to Section V of the defendants' proposed judgment but, again, with the exception that in the Government's proposed judgment the injunction applies to bakery products in general and is not confined to the

Jacksonville area nor to sales to such Naval installations.

In addition, Section V(A) of the Government's proposed judgment contains a general injunction against "urging or suggesting to any seller of bakery products the quotation of charging of any price or other terms or conditions of sales of bakery products."

Likewise, Section VI of the Government's judgment is comparable to Section VI of the defendants', with the exception that the Government's proposed judgment is broader, requiring the submission of a sworn statement for a five-year period.

In some, the Government's proposed judgment is somewhat broader. But can it be said the Government
348 is unreasonable in being apprehensive that the defendants, having conspired to fix the price of bread and rolls to certain Government installations in a certain area, will not also attempt to fix the price of other bakery products to other Government installations in other areas?

The Court: Well, this part of your brief that you are reading there, is met by their concessions.

Mr. Stuckey: That's true.

The Supreme Court, Your Honor, in *International Salt Company v. United States*, 332 U.S. 392 at page 400, said this:

"When the purpose to restrain trade appears from a clear violation of the law, it is not necessary that all of the untravelled roads to that end be left open and that only the worn one be closed."

In *Local 167 v. United States*, 291 U.S. 293, at page 299, the Supreme Court stated:

"The United States is entitled to effective relief. To that end, the decree should enjoin acts of the
349 sort that are shown by the evidence to have been done or threatened in the furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing the provisions doubts should be resolved in favor of the Government and against the conspirators."

It is respectfully submitted that the defendants' motion should be denied in this case, Your Honor.

The Court: Well, let me ask you, with 54(c) providing that the Court should tailor the relief granted to proof, isn't this an old carry-over from equity pleading days when other and further relief—I think it's Paragraph (c)—isn't that just an antiquism or an archaism, or however you pronounce that word?

Mr. Stuckey: Yes, sir. I think there we have the same purpose but, Your Honor, there hasn't been any proof in this case.

The Court: When I studied equity pleadings in college, Judge Cockrell told us not just to pray for other and further relief; he said you should pray for such
350 other and further, or other, or further relief.

Mr. Miller: Be sure you get it.

The Court: To be sure that was all in there. But with the Rule that says that when the proof comes in that the Court is free to grant additional relief if the facts warrant it—

Mr. Stuckey: Yes, sir.

The Court: —it seems to me that putting that prayer in there is just sort of superfluous and I don't—what I am saying is that I doubt if the Government has asked for any more relief than what they have alleged in the Complaint entitles them to. We are not dealing with a situation that is discussed in these cases you cite, in the International Salt and these cases, where the right of the Court in its discretion after proof to extend the scope of an injunctive order is upheld. We are dealing with a situation where you have come in and made allegations of fact and asked for a specific ruling.

Mr. Stuckey: Yes, sir.

351 The Court: Where they have come in and offered to have a judgment entered against them, granting you the specific relief you asked for right straight down the line, and have now offered to meet the objections of your judgment section, and have now extended that offer to take in more products and more installations, give it greater geographical effect and also apply it to all bakery products.

Mr. Stuckey: I think the only argument left with this new judgment, Your Honor, is the fact that the Judgment Section wants the decree to go to the general public, not

just Government installations, and the three-year period extended to five years. I believe it can be summed down to that; at least that's the way I read it at the present time, without having much time to study it.

Mr. Miller: Your Honor, would it be proper for me to ask the attorney for the Government whether or not the Judgment Section proposes to dismiss Derst Baking Company as to Count II also, because I don't think there is, even by the stretch of the imagination of
352 the Government and their apparent presumption of guilt that they follow in Washington, could they assume that Derst Baking Company has been a party to a conspiracy involving prices to the general public.

The Court: Because they weren't a party to the—

Mr. Stuckey: Indictment.

The Court: —to the general public indictment.

Mr. Miller: Yes, sir, that's right.

The Court: Well, what would you—assuming that I said, "All right, Mr. Government, we will enjoin these defendants both as to dealing with Government installations and dealing with the general public," you would suggest then that everybody else be enjoined in that fashion and that Derst only be enjoined as to Government installations; is that what you suggest?

Mr. Miller: No, sir. The reason that I posed that question was to merely high-light the unreasonableness of the Government's position and to emphasize that in this
353 case that the Government has committed themselves to by their pleadings, it would be improper in the trial of the case to bring in any evidence with regard to price-fixing to the general public, with Derst Baking Company being a party defendant. Without bringing in evidence of price-fixing to the general public, I don't see how the Government can take the position that—before Your Honor and this status of the case—they are entitled to a broad decree against all defendants as to price-fixing to the general public.

The Court: Since one of the alleged conspirators hasn't, we can say, using the term roughly, hasn't had a day in Court on that proposition.

Mr. Miller: That's true. And the Government hasn't even contended that one defendant has been a party to any

price-fixing to the general public. And of course, the Government has already conceded that in effect, I think, that Derst Baking Company doesn't even do business in Florida, so it couldn't have possibly been a party to a conspiracy to fix prices in the State of Florida as to the general public. So my raising that point, Your
 354 Honor, was not to propose any different treatment of Derst Baking Company and any of the other defendants. My purpose in raising the point was merely to ask Mr. Stuckey if he contends that, if he is to make a record in this case, does he contend that he is entitled to bring in evidence of price-fixing to the general public as to any defendant, with Derst then in the case?

The Court: Maybe he will want to—

Mr. Stuckey: I would contend, Your Honor, that the Government could bring in that type of evidence in a hearing on relief, probably not in the trial of the case but certainly at a hearing on relief if the Government won.

Mr. Dunlap: Your Honor, I think this pinpoints the difference. They have pleadings here in which they bodily left it out of the criminal proceedings on bidding to Government installations. Now, they could have well pleaded, if they wanted to, a different conspiracy and different facts, and asked for such relief; but they limited themselves here by lifting that one out, and on those same facts they are almost identical—they are identical practically, with what they based the criminal proceedings which was limited strictly to Government bidding to these installations in northeast Florida and southeast Georgia, Glynnco and Naval Air Station.

Now, it looks like to me that if you try to bring in—say we are adjudicated guilty in that, and that's in effect what this proposed judgment does, we have given them all the relief on that set of facts that any conceivable evidence, we feel, could be brought in.

I don't see how on those allegations that the Government can come in and present any evidence of some other violations somewhere without setting it up in their pleadings and properly appraising us of what it is. We wouldn't even know what we were going to meet. It would be a complete surprise. We wouldn't know pleadingwise what in the world his evidence would be, and certainly we feel

we have gone beyond anything that's required and what he has asked himself.

We didn't limit the Government in filing these pleadings. We say, once they have filed them, that they ought to be required to limit their proof to the basis on which they filed their Complaint. And I think that it certainly could not be contended that we haven't gone beyond any—
 356 that we have, in this amended judgment, given the relief which the furthest relief or the broadest circle of relief that the Court could grant at a trial of this case.

Mr. Blackshear has prepared to argue more on this point, Your Honor, and I was—our argument was divided, I was more or less going to fill in the facts and then Mr. Blackshear present the argument.

The Court: Let's go ahead and have the argument.

Argument by Mr. Dunlap

Mr. Dunlap: All right, sir.

Your Honor well knows the history of this case. There was a criminal indictment on the Government bidding and the payment of a fine. Then bodily lifting out those same allegations as to the Government bidding in the criminal case, they placed them in a civil case and brought two counts: Count I, which involved the False Claims Act, and Count II, asking for injunctive relief.

We settled Count I, which meant that we paid twice in this matter—once to the criminal side and once on the civil side—for the same set of facts; and that left the injunctive relief.

At the last Pre-Trial hearing, as Your Honor will
 357 recall, we had a full discussion of Count II and the defendants filed their Motion for Judgment, which is somewhat narrower than the proposed judgment contained in the plaintiff's—rather, the defendants' Motion for Amendment.

Now, at that last hearing, Your Honor, remember we cited two cases. The Government overlooks one. We cited *Brunswick-Balke* and the *Aero Mayflower* case, which I gave Your Honor a copy of, which was entered by Frank Scarlett. Those two cases are on the books; they are both to be found in reported cases, where the Court in its equity jurisdiction has entered a judgment over objection of the

Government, the Government making the same objections in those cases that they are making here. I will let Mr. Blackshear argue that a little more extensively but—

The Court: Well, would you concede that his point about Brunswick is well taken as to—factually as to what was eliminated in the decree from what the Government wanted? They wanted—I gather from what Mr. Stuckey says that in the Brunswick the Government had—in the Government's proposed decree, they had a provision that in any treble-damage suit by private parties, they
358 would—the defendants would admit liability and concede guilt brought on the same set of facts.

Mr. Dunlap: Your Honor—

The Court: That is—

Mr. Dunlap: Excuse me.

The Court: And that is the part that was eliminated rather than any enlargement of the facts of the complaint or the prayer.

Mr. Dunlap: I don't have the full facts, Your Honor. It appears from what we have before us that from the opinion of Judge Tehan that would appear to be correct, but I would call Your Honor's attention that under the statement of the objections, the first Government statement of objections, that identical point was in the Brunswick-Balke case.

The Court: What I'm getting at is that if that's all that was eliminated, I don't see how that Judge could be de-

359 faulted for cutting that out because, when you enter

—it just seems to me to be a grossly improper provision for a decree that from this time forward that anybody that comes in with treble-damage suit that we are going to admit guilt and concede liability, based on the same transaction. And that's tying them down to, that's denying them a day in Court on anything that any private party wants to dream up and bring them in there on. And the force of the Brunswick case as persuasive precedent is strongly diluted, very much diluted, if that's all that was taken out of the Government's demand there.

That's a lot different than saying that the Government can come in and inspect. That's saying that from henceforward you have got to come in when anybody points a gun, you have got to drop dead whether you feel like it or not.

Mr. Dunlap: Well, Your Honor, on that point, let me say the Brunswick case to me has two things: The first thing, it certainly is a direct holding against the Government that in no event over the objections of the Government can the Court enter a decree which is in effect called a judgment or which is analogouse to consent judgment. That's the first point that they made in the Brunswick case, that the Court was without power to do it.

The Court: He makes that.

Mr. Dunlap: I say that's his first point in the Statement of Objections.

The Court: Yes.

Mr. Dunlap: So it certainly stands for a precedent on that point.

Now, we come down to an exercise of the Court's power, and I believe that's where Your Honor is talking about now.

Now, I don't know—I don't have the Brunswick case before me, but I believe that it may well show that what the provisions, the other injunctive provisions, were certainly—had some relation to the facts as filed in the complaint and the prayers asked for on the Government in that case.

Now, unfortunately, we don't have the record here but I think that the main thrust of it is that the Court does have the power over the Government objections to enter this decree, and once it's conceded, it's out; then we are to the point of the exercise of the Court's power. And I concede, Your Honor, that Judge Tehan's opinion does show that, outside of that one provision, everything else was agreeable between the parties. I would not dispute as to that. But still the Government objected and that was part of what they wanted, and the Court said:

"We are going to enter it anyhow."

And by the way, Your Honor, the Government in their brief says that case has not yet been appealed, and their brief was written on May 31st. The opinion was on the 27th and I believe it is a sixty-day period, so if it hasn't been appealed, it looks to me like they have been caught by the sixty-day statute on that matter.

The Court: Well, knowing the Government, on the fifty-ninth day they file a Notice of Appeal and it's still sitting up—they will wait until the thirty-ninth day after that to decide whether to go to work on the record. If they do, why then they will come in and ask the Judge to extend the time for lodging the record in the Appellate Court. They—

362 Mr. Dunlap: The reason I said that, Your Honor, usually this service picks up those notices of appeal, and I understand that's one thing that cannot be extended, the filing of the Notice.

The Court: The filing of the Notice, no.

Mr. Dunlap: They usually pick those up.

The Court: What they do is file that Notice and let it sit there until the time for lodging the record in the Appellate Court is about to expire and then come in and get an extension to ninety days for that, and they still don't decide.

Mr. Ball: The point we make though, Your Honor, is that on the 31st of May, which was then after the sixty-day period had expired, they said they hadn't then decided to do that.

Mr. Dunlap: The brief says that.

The Court: Well, the brief writer, he may not be advised. Up there in the Department of Justice, there
363 are thousands of lawyers.

Mr. Dunlap: Your Honor, we had those two cases before you.

Mr. Stuckey: I think you hit the nail on the head.

The Court: The Government's right hand doesn't know what its left hand is doing always.

Mr. Dunlap: After we filed our Motion with Your Honor and had the discussion of the Brunswick-Balke and the Aero Mayflower cases, the Government then filed its objections 1, 2, and 3; the first objection being that they were entitled to an adjudication of guilt. That was the same argument they made in Brunswick-Balke and the Court said:

"That's the very thing you are not entitled to, to be used against you."

If you will read the second page of the Brunswick decision, you will notice they made the same argument.

Secondly, they made the objection that the Government objects to confining the scope of it to bread and rolls and to a certain limited geographical area. We have met that.

364 The third one is a three-year period rather than a five-year period. That was based on the facts in *Carey Salt*, which the Government entered into, which was a bid-rigging case; they agreed to a three-year period.

Then in their brief, Your Honor, when it comes down to what they are really afraid of, and I take it the injunction—Mr. Blackshear here will present a more extensive argument as to what the proper scope of the injunction is. At the bottom of the Government's brief, on page 6, they sum up what they really are afraid of in future violations, and I would like to read it to Your Honor.

"In sum, the Government's proposed judgment is somewhat broader. But can it be said that the Government is unreasonable in being apprehensive that the defendants, having conspired to fix the price of bread and rolls to certain Government installations in a certain area, will not also attempt to fix the price of other bakery products to other Government installations in other areas?"

They say not one word about anybody fixing prices to anyone other than other Government installations
365 in other areas. The only reference to the public is when they say that one difference between their decree and ours is that theirs relates to the general public. But when they talk about what they are afraid of, about being apprehensive about, there is not one worry in their brief about being apprehensive that we are going to fix prices to the general public.

Then after the defendants received the brief and the statement of objections, we sat down and honestly tried to figure out what the broadest possible injunction was that the Court would be able to grant on the cases if Mr. Stuckey was able to prove everything he alleged in his complaint and bring in all evidence on the relief which

would in any way be admissible in this state of the pleadings and under the case as it's filed before Your Honor.

Then we filed a motion to get the Court's permission to file our amended motion, to which we appended the affidavit of Mr. Blackshear and the amended proposed judgment. And the purpose of the affidavit of Mr. Blackshear was to give in the record a history of the negotiations, a history of the various viewpoints of the Government and the defendants, to show that we had made every good faith effort to give the Government everything to which they were properly entitled and which they would get upon a trial of this case.

And that brings us up to the present argument and we believe, Your Honor, that the new amendment gives the Government everything to which they are entitled on this record under any conceivable evidence which would be proper and material upon proving this complaint.

And I would like now, with the Court's permission, to defer the argument, the rest of the argument, to Mr. Blackshear.

Argument by Mr. Blackshear

Mr. Blackshear: If Your Honor please, the argument that I plan to make is not going to be near so lengthy or so elaborate as my brother's introduction would perhaps lead the Court to believe.

We have prepared a brief, copies of which have not yet been served. If I may, I'll pass this on to the Court and just give Mr. Stuckey a copy.

Mr. Stuckey: Your Honor, I'm certainly put under a disadvantage. After an argument, I'm handed the defendants' brief in this case. Our brief has been on file for two weeks, and here I'm served with a brief after I make an argument.

367 The Court: Well—

Mr. Blackshear: This is a reply brief, Your Honor.

The Court: I understand. Of course, if after hearing you, if I decide it's necessary, I'll give you a reasonable time to reply to it. The Show Cause Order didn't lay out any rules for serving briefs. It just fixed—I believe it fixed a date for you to file objections. Maybe that was left

until the return date of the rule. I don't know that; I'll have to verify that. June 1 was the date fixed.

Mr. Dunlap: Yes, sir.

The Court: And that you complied with. You were directed to file written reply on or before June 1st; nothing said about accompanying brief or any time they should file reply brief. At the hearing it seems to be timely to me, with the reservation that if it is necessary in my judgment, I would give you leave to reply to theirs.

Mr. Stuckey: I wasn't going to make any formal exception to it.

368 The Court: Yes.

Mr. Stuckey: But I just say I'm under a disadvantage when I have one day to study an amended consent judgment, when I'm ordered by June 1st to reply to another judgment. That's why my brief was directed to the other judgment, because I actually haven't had time to study this material. I only got it yesterday.

The Court: It was filed here on the 11th and you got it in the mail yesterday before you came down here?

Mr. Stuckey: Yes, sir.

The Court: All right, sir. You may proceed.

Mr. Blackshear: If Your Honor please, we feel that it's important to keep in mind that the injunction that is provided by Section 4 of the Sherman Act is an injunction which is to be exercised and to be governed by traditional principles which are contained in equity proceedings.

The Courts have uniformly held that it's necessary for the Government in such an injunction suit to show a threat of a violation of the law. Cases so holding include
369 *De Beers Consolidated Mines v. United States*, in
325 U.S. 212, pages 218 and 219; *U. S. v. National City Lines*, a District Court of Illinois decision, 1955, reported in 134 F. Supp. 350, at page 355.

I am at the third division of my brief, argument and authorities. The pages are not numbered in this brief.

The purpose of an injunction by the Government under 15 U.S.C.A., Section 9, and that is Section 4 of the Sherman Act, is to prevent future violations and before relief must be granted, in the language of some of the Courts, there must be some cognizable danger of violation in the future.

Among the other cases so holding are *United States v. W. T. Grant Company*, in 345 U.S. 629; and *United States*

v. *Oregon State Medical Society*, a 1952 decision, reported in 343 U.S. 326; and another opinion in *United States v. National City Lines*, reported in 118 F. Supp. 465, at page 467.

In this brief, we have stated that there is a motion to dismiss Count II as failing to state a claim on which relief can be granted; because there is no statement in this Count showing that there is any cognizable danger of repetition. And in the brief we have suggested that perhaps the Court ought to pass on that Motion to Dismiss before acting on the Motion here.

After consultation with the other defendants, we wish to change that now. We wish to say simply that, if the Court is disposed to grant our Motion to enter a judgment on our confession, then it should do so without first acting on the Motion which was previously made, and of course it would be rendered moot.

In the second of these two decisions, in *National City Lines*, the one reported in 134 F. Supp. 350, Judge Hoffman stated, at page 355, and I quote:

"Consideration of the proper breadth of the decree which may be entered requires that a delicate balance be struck. On the one hand, the relief afforded must be adequate to meet the need. An injunction must be broad enough to prevent a repetition of the wrong, and a mere deviation in the method by which the same evil is accomplished cannot be permitted to evade the prohibition. Accordingly, a decree may close all roads to the prohibited goal, and is not confined to the well-worn road."

371 Citing the *International Salt Company* case.

"The Judge, in assuring the public freedom from the illegal conduct, may range broadly through practices connected with acts actually found to be illegal."

Citing the *United States v. United States Gypsum Company*.

"On the other hand, finding of an offense under the Anti-Trust Laws does not invest a court with a license to embark upon a general program of compre-

hensive control of the defendants' business. The limits of the controversy must be observed. The court is 'bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law.' "

Citing *Swift & Company v. United States*, reported in 196 U.S., at page 375.

372 "The mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.' "

Citing *N.L.R.B. v. Express Publishing Company*, 213 U.S. 426.

"To range far beyond the hard facts—"

The Court: That must be 313 U.S.

Mr. Blackshear: That perhaps is correct.

"To range far beyond the hard facts of the questions actually tried in the case is to invite the errors of a broad rule which proves unjust in the light of unforeseen circumstances. The court is constrained, then, to steer the narrow course between the hazards of a failure to cure the evil on one side and unwarranted and oppressive control on the other. In its essence, the principle involved is simply that we should not attempt to accomplish in a single suit what should fairly be left to a later action when and if it proves necessary.

373 "In reviewing the language of the plaintiff's prayer for relief in the light of these considerations, the reader must take into account the nature of the offense charged and actually litigated by the parties. Under the liberal provisions of Rule 54(b) of the Federal Rules of Civil Procedure, the plaintiff is not bound

to prove all that he alleges, nor is he limited in judgment in his favor to the relief he has demanded in his complaint. Under that Rule, a litigant is to be awarded whatever relief the facts as litigated entitle him to. But in determining what is fairly within the boundaries of the controversy, the distinction between a civil action brought on behalf of a private person cannot be ignored. 'The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served.' "

374 Citing the *United States v. Borden Company*, in 347 U.S. 514.

"Reasonable limits are set for the private suit by the limits of the plaintiff's interest at stake, and the defendant is put on general notice by the nature of the opposing litigant to the extent of the possible controversy. But when the Government is the civil plaintiff, the scope—"

The Court: She covered too far here, didn't she? Didn't she cover too far here?

Mr. Blackshear: Perhaps so, but I think this next sentence is right in point:

"But when the Government is the civil plaintiff, the scope of the interest to be protected by an injunction is as broad as the national economy. In such cases, principles of elemental fairness demand that the bounds of the issues relating to injunctive relief be determined with reasonable certainty by the pleadings."

375 Now, we think that the Court should—that Rule 8-A of the Rules of Procedure throws light on the problem we have here. That Rule in its pertinent part provides that a pleading which sets forth a claim for relief shall contain a short plain statement of the claim showing the pleader is entitled to relief and demand for judgment for relief to which he deems himself entitled.

Of course, the Rules of Procedure stay away from the use of the term "facts" in talking about pleadings. However, if I may use the word "facts", this Rule states that what the plaintiff is entitled to depends on the facts which he sets out as descriptive of his claim, read in connection with the prayer for relief.

Now, the facts in this Count, as set out by the Government, are that these defendants have violated only by allocating the business of supplying two Naval Air Stations and rigging the bids that were furnished on the invitation of those two Naval Air Stations to supply bread and rolls to them. That is all of the facts on which the Government predicates its relief.

They do not say that these defendants threatened to violate in that way or in any other way in the future, but if there is any implication that there is a cognizable danger of future violation, it is the implication that arises from the fact that they have violated in this respect in the past.

Now, certainly we recognize that under certain circumstances, any plaintiff in an injunction suit is entitled when his right to some relief has been established by proof or by admission, the plaintiff may nevertheless be entitled to introduce evidence so that the Court can exercise its judgment wisely in deciding what nature of injunctive relief is necessary to remedy the danger.

However, in this particular case, if the Government wishes the privilege of introducing evidence showing what relief it needs, it certainly has not set that out in response to Rule Nisi.

Our Motion must certainly be taken as admitting, for purposes of entry of judgment, all the facts that the Government has set out in Count II. Certainly if we give them the judgment they are entitled to, we say you can treat the things they say we did as if they had been proven, or as if they were admitted; and when that is done, if there is still some reason why the Court cannot intelligently exercise its judgment in granting injunctive relief without receipt of further testimony, you would expect the Government to come in and set that out by way of response to the Rule Nisi and to state where and how the Court can't act just on the resolution

of the facts set out in Count II and why it's necessary to consider other facts, and what other facts are to be considered to show the scope of the relief.

But it seems to me that there is implicit in the Government's position all the way through that, once a defendant has been shown to have violated Anti-Trust Laws that then, simply by virtue of that fact, the Government is entitled to an injunction which will restrain him from any other violations, and we submit that that is not the law and the cases do not so hold.

Now, we contend, on the authority of the Brunswick-Balke-Collender case and on other authorities, that Congress has set a policy that is designed to encourage defendants in both criminal and civil Anti-Trust cases to come in and capitulate promptly to the Government's demand, and that the policy set by Congress provides that when defendants come in and yield immediately to what the Government has demanded, then the judgment entered on that consent shall not be usable against them in any
378 treble-damage suits by third parties. And we say that that is what we have done.

Now, the Government's position seems to be that the Department of Justice has got a discretion and that they can withhold this privilege from defendants to whom they do not choose to grant, but as Judge Tehan has pointed out in the Brunswick-Balke, nothing in the legislative history of this Act, nothing in the language of the Statute itself, shows or implies that this right is at all qualified and that the Department of Justice has any discretion whatsoever as to giving defendants the benefit of this right.

The Government also seems to take the position that in order that there may be a consent judgment, the defendants must not just capitulate to the claim made in the civil suit but they must come to terms and must get a further agreement from the Department as to the scope of the relief.

Now, if Your Honor please, if that be the law in civil cases, then you would expect it also to be the law as governing consents in criminal cases, and yet in *Twin Ports Oil Company v. Pure Oil Company*, 26 F. Supp., at page 366; and in *Barnsdall Refining Corporation v. Birnamwood Oil Company*, 32 F. Supp., at page 308,
379 at least in those two cases, the courts have held that

a nolo plea to a criminal indictment is a consent judgment or decree within the meaning of Section 5 of the Clayton Act, which contains this enunciation of the Congressional policies that I have just been describing.

In the *Twin Ports Oil* case, the Court said, page 376:

"In effect, Congress said to the law violator, 'It is to your advantage to capitulate to our demand before any testimony is taken in any equity or criminal proceedings. If you fail, and a decree of judgment is entered against you, such decree or judgment will constitute prima facie proof to any or all private litigants who may have been injured by your unfair practices.' That the expediency of the plan appealed to Congress and that it intended by the provisos to encourage consent judgments in criminal cases, as well as equity proceedings, can scarcely be gainsaid in view of the Congressional record."

In the *Twin Ports Oil* case, it was apparently contended that it was anomalous to speak of a consent judgment in a criminal case, but addressed to that part
380 at page 372 of the *Twin Ports* case, the Court said:

"However anomalous the term 'consent judgment' in a criminal proceeding may be, it must be conceded that Congress unmistakably intended to include judgment entered on pleas of guilty and pleas of nolo contendere in pending cases as consent judgments if entered forthwith after the adoption of the Act. . . ."

And it is quite familiar and it happened in this case that the offer of a plea of nolo contendere was not acquiesced in by the Department of Justice and the Department has resisted.

Now, one other point and I believe I can conclude my argument:

A great deal of stress has been put upon such cases as *International Salt* and *Local 167 v. United States*. The Government's memorandum quotes from these cases and deals with the right of the Court to close the so-called untravelled roads and to enjoin against types of acts somewhat different from the acts which have been charged

as past violations, but I want to point out this about
 381 International Salt Company. International Salt
 Company, and I think Local 167—what I'm about to
 say also applies to the facts in Local 167. In those two
 cases, the defendants had been charged with a broad gen-
 eral conspiracy to monopolize.

In Local 167, I recall that it was said that this con-
 spiracy had been well financed; it was very extensive and
 it ramified into all aspects of the poultry business, as I
 recall it.

And so the Court said:

"This is not only appropriate to destroy this monopoli-
 zation, to enjoin against the specific overt acts in
 furtherance of that conspiracy, but to enjoin against
 other acts which it is quite likely will be undertaken
 in furtherance of that conspiracy."

The key language, I think, appears in the International
 Salt case, in the very quotation that the Government uses.
 And that says:

"When the purpose to restrain trade appears from a
 clear violation of the law, it is not necessary that all
 382 the untravelled roads to that end be left open."

And there, past violation showed a general purpose
 to restrain trade.

Now, what are the facts in the case at Bar? It has not
 been suggested that the bid-rigging and allocation of the
 Navy business among these defendants was any part of
 any broad general conspiracy.

It has not even been suggested that anybody over the
 level of local plant manager of these four companies had
 any awareness whatsoever of what was going on. It was
 something that was complete within itself.

Now, Mr. Stuckey pointed out at the time of the pleas
 in the criminal cases that several of these defendants have
 a good many plants located in other areas; a purely local
 conspiracy at the plant manager level simply as to how
 bids were to be submitted on supplying these two Naval
 Air Stations can't possibly be said to constitute any threat,
 for example, for these bakeries or some of them to get

together and conspire to fix prices in the Chicago area for the sale of bread, or in any other area. The mere fact that they have been law violators in the past in one particular is no reason or no threat as to a possible violation in these other areas and in other sections.

383 And those are the reasons why we insist that what we have offered by way of injunction is everything that the Government could conceivably be entitled to after a trial and after proof of all the facts they have set out.

Now, I think, as already has been demonstrated—it has already been demonstrated in Mr. Dunlap's argument and authorities how the Government is not entitled to an adjudication of guilt. The other reasons that they are saying why the Government—why the judgment we offer is contrary to the public interest is because they say it deprives them of the right to have the spectacle of a public trial, in that that is advantageous to the Government in enforcing the Anti-Trust Laws.

If Your Honor please, I think that argument is entirely frivolous. Any litigant who comes into Court and sets out a claim to certain relief and is met with the response, "We give you all the relief you are entitled to", certainly has no vested right under any law which I am familiar with to say, "Oh yes, although you are willing to give me all the relief I ask, I still would like to have a trial because I would like to get the newspaper publicity and benefit that flows from such a trial."

389

Argument by Mr. Boman

Mr. Boman: It's really a summation that I think we all know but it may be just stating it in other words; the position of the inequity in this whole situation that has developed starting back in October, 1960.

The Judicial Conferences and others have been trying for really years, Your Honor, as you well know—these so-called big cases, Anti-Trust cases, how they congest the docket and eat up the time of Government counsel and defense counsel and the courts and everybody, the jury and others—to find some way to expedite so that the end of justice will be served.

I think from an equitable position that these bakeries have manifested uniformly throughout that they have tried to the best of their ability; when the punishment end of it came up, they did not fight and they were punished by the fine of the Court and paid it.

When the Government next sought in Count I its damages to be made whole for the loss, Your Honor knows that Count I too, with its very questionable points of law, were acceded to by the defendants and the damages
390 were paid.

And now we are down to the third round and I hope the last one in trying to be put in an equitable position of submitting to the Court voluntarily more than the Government has sought in its own Petition, and I think, Your Honor, when you look at the whole picture that way, that the equities balance toward the entry of a decree that the defendants have proffered to Your Honor.

Mr. Dunlap: Nothing further.

Mr. Ball: Nothing.

The Court: Would you like an opportunity—You indicate you don't care to reply to the argument. Would you like an opportunity to reply to the brief?

Mr. Stuckey: I don't think so, Your Honor; I think this case has been briefed enough.

The Court: Well, I would—

Mr. Stuckey: I would like to reserve that privilege to take up with my superiors, if they would like to reply to it.

391

Colloquy Between Court and Counsel

The Court: Well, here is the position as I see it:

The plaintiff was directed to respond to this Rule as to why the proposed Decree, that proposed by the defendants, should not be entered. And you were directed to object in writing by June 1st; the plaintiff was.

Now, two or three days before the hearing, the Motion is filed asking leave to amend the defendants' Motion to enter a Final Decree and proffering slightly—oh, I wouldn't say slightly, but proffering a decree granting broader relief than that first indicated they were willing to consent to.

In fairness, it seems to me if I grant the Motion, which I think I should do to permit them to proffer this Amended

Motion with the further Amended Decree, I should give you an opportunity by brief or by written objections or in some form to put in the record before me the objections that you may have to the granting of this one.

Mr. Stuckey: I might say at this point, Your Honor, that I don't believe anybody in the Department has seen this group of papers except me. Maybe Mr. Kilgore would like the opportunity you afford him now.

392 The Court: They have met—in effect they have met some of the Government's demands as to what should go into this Decree; they have not met the others. It seems to me—Let me ask if this is a correct statement: That if the—well, let me ask this first:

In what you call the adjudication of guilt, what is the gist of the provisions there?

Mr. Stuckey: That's only after trial, Your Honor; after trial. And you would have to adjudicate—

The Court: You are not contending that there should be an adjudication of guilt in this—

Mr. Stuckey: Decree.

The Court: —in this Decree?

Mr. Stuckey: No, sir.

The Court: In other words, you are following—in effect, following Section 5, saying it does not—

393 Mr. Stuckey: I don't see how there can be an adjudication without taking of evidence.

The Court: Well, it comes down then, it seems to me, to whether—to just simply two points, as to whether the sworn statement that's required of them be limited to three years or five years; and the other point as to whether all bakery products—I mean, as to whether sales to the general public as well as to the Government installations should be brought under the injunctive decree. There are just those two points.

Mr. Stuckey: That's the way I interpret it, Your Honor.

The Court: As this is now entered.

Mr. Dunlap: Your Honor, we have had a quick caucus between us and we are willing—the three or five years is not of major importance and we would be willing to—

The Court: Go to five?

Mr. Dunlap: Go to five. However the Court
394 wants to do it either on the record on an instant motion—

The Court: That's something that, if the case had gone through trial and it was decided that that was a right that should be accorded the Government, it would be a discretionary matter to say you'd better give it to them for three years or five years. It would be something that—It's just like in one of these criminal cases where we either put a defendant on probation for three years or five years. If you think his rehabilitation could be accomplished in three years with supervision, why, you give him three. If you think you have got to watch him for five, why, you make it five.

In other words, that seems to me, since it would involve the exercise of discretion after hearing and on judgment based on findings after hearing, that it is pretty much discretionary now.

Mr. Dunlap: Yes, sir.

The Court: Well, sir, if you would like then, I'm prepared to say that I'll consider that, either further written objections or a reply to this brief filed today within
395 ten days, and then possibly to enter an order.

Mr. Stuckey: All right, sir.

Mr. Dunlap: Will that be enough time, Henry? Ten days?

Mr. Stuckey: I think—

Mr. Dunlap: Thirty days is all right with us.

Mr. Stuckey: I think I would probably prefer the longer time.

The Court: All right. Make it thirty days. And it's understood that those will be considered without any further hearing and without any further reply.

Mr. Dunlap: Yes, sir.

The Court: Without further reply by the other side. I think we've got to bring an end to this thing.

Mr. Dunlap: Yes, sir.

Mr. Stuckey: All right, sir.

396 Mr. Dunlap: Your Honor, I believe, in reciting the Order that will be entered, our Motion for Leave to File Amended Pleadings would be granted; is that right?

The Court: Yes. I am perfectly willing to enter that sort of intermediate or interlocutory order now, dealing with these affidavits and dealing with this June 11 Motion.

Mr. Dunlap: Yes, sir.

The Court: And set up that final action will be taken after this thirty days, if somebody will draft that sort of an Order and present it. Maybe we ought to make a record in the file of that.

Mr. Dunlap: That's what I thought, Your Honor; record what action, in effect, you were taking today.

The Court: And you can say your brief is received at the hearing, your brief and your changed position as to what you are willing to agree to are what he primarily wants, he may want to meet.

397 Mr. Stuckey: If the Department does not wish to file a reply brief, shall I just notify you by letter?

The Court: Well, I would be glad if a decision is reached and under thirty days not to do anything—

Mr. Stuckey: That's what I was going—

The Court: —by letter or by some sort of paper that you could put in the file, entitled, "Consent to the entry of Decree without further—"

Mr. Stuckey: I couldn't do that.

The Court: Well—"to the consideration of the entry of Decree."

Mr. Stuckey: Yes, sir.

The Court: Or a waiver of the right—you can call it waiver of the right to reply or object.

Mr. Stuckey: All right, sir.

398 The Court: And mail that to other counsel and mail it to the Clerk so it is something in the written record, rather than a letter, is the only thing I had in mind.

Mr. Stuckey: All right, sir.

The Court: In other words, the terms of the Order ought to be met by something else that's filed, and if something like that is lodged I would consider myself free to go ahead and not wait the thirty days.

Maybe after you get up there, why, Mr. Kilgore will be—

Mr. Stuckey: I'm going on a month's vacation on June 29th.

The Court: June 29?

Mr. Stuckey: Yes, sir.

The Court: Maybe we ought to make it fifteen days then.

Mr. Stuckey: Then I know I won't get any vacation.

399 Mr. Miller: Your Honor, I have one question to ask:

In your last discussion about whether the requirement of filing affidavits with bids should be for three years or five years, you made reference to the matter that it would be discretionary after hearing evidence.

I wondered whether it would be of any assistance to the Court if the defendants would amend, by written amendment, or amend instanter, the proposed Decree to make it five years to meet the objection of the Government?

The Court: Well, let's do it by instanter amendment and interlineation, if it's all right.

Mr. Dunlap: All right, sir. I think all you have to do is change our three to five.

The Court: In what paragraph?

Mr. Dunlap: That would be in the proposed judgment, Your Honor, if I might come here —

400 The Court: At the top of page 3?

Mr. Dunlap: Yes.

The Court: Roman V?

Mr. Dunlap: Roman V.

The Court: To five years. You'll probably get in the habit of doing it and keep on doing it after three years anyway.

Mr. Miller: That's true.

The Court: Now, there is one other thing, this question of your Motion to Dismiss Count II.

Mr. Dunlap: Mr. Ball was to be the spokesman, since he was principal arguer of that in the other hearing we had, Your Honor.

Mr. Ball: Your Honor, our position on that is primarily that if Your Honor is going to entertain and grant the judgment that we have requested in the now amended
401 form, that we would consent to the entry of an Order denying that Motion.

On the other hand, if Your Honor is not going to do it, we want to argue and we want to argue it vigorously and we would like to have a full-scale hearing on it. And in that event, we would like to request the Court to grant us more time within which to file a brief. We have now—

The Court: I don't know; my inclination is to say this: That if you are going to put your head on a chopping-

block, you ought to do it without reservation and let me deny the Motion to Dismiss today and this Order be entered today. That's how I would feel about it. And then—

Mr. Stuckey: We have already argued that.

Mr. Ball: It has been argued.

Mr. Dunlap: It has been argued. It will be just a question of filing briefs.

The Court: It was argued; I understand that.

402 Mr. Dunlap: Yes, sir, it was argued.

Mr. Miller: Your Honor is not asking us to consent to your—

The Court: No, I'm not asking you to consent but—

Mr. Miller: Just consent that it is right to be decided?

The Court: It's right to be decided and not file any more briefs and let this be my action denying it, to put it in this Order that Motion to Dismiss is denied.

Thirty days are going to take you to about July the 8th, or whenever it is, anyway. You are going to have another hiatus about not knowing what to do about filing briefs; let's just deny it.

Mr. Dunlap: All right, sir.

The Court: I think you are in an anomalous position as long as you are urging it anyway.

Mr. Dunlap: Yes, Your Honor.

403 Mr. Ball: I think so.

The Court: Because you are coming in and offering to grant all relief asked in one breath, and in the other breath saying it isn't a claim on which relief can be granted. I think you just let me go on and deny it.

Mr. Dunlap: I think it, in order to straighten out the record, we will say defendants waive the right to file further briefs.

The Court: All right. Put it that way.

Mr. Dunlap: I don't think it makes any difference.

The Court: And that the Motion is accordingly denied.

Mr. Dunlap: I don't think it makes any difference but if you want to be precise about the record—

The Court: Let me say this now: That I'm going to enter your Decree, or the Government's Decree, one, see?

404 I'm going to enter a Decree here. I'm not just going to enter an Order after this thirty days expires, saying that we'd better go on to trial.

Isn't that understood?

Mr. Dunlap: No, sir.

Mr. Stuckey: No, sir.

The Court: It isn't!

Mr. Dunlap: No, sir, because I think we clearly withheld that at the last hearing.

The Court: That may be so; that may be so.

Mr. Dunlap: That we said—

The Court: I don't have that transcript.

Mr. Dunlap: I believe I'm correct. I believe everyone understood. That was the last thing I said and I believe one of the first things we said, that we did not agree that we were foreclosed from a right to go to trial if you decided to enter the Government's Decree. That was the whole problem we had, and we don't think that that
405 would be proper, and I believe our Motion covers that point too.

I think that was clearly stated at the last hearing, Your Honor, and that you understood—I thought you did—that that was true.

Mr. Miller: Certainly, Your Honor, Derst Baking Company cannot be put in the position of consenting to the Court's action in the alternative of either granting the proposed Amended Decree as proposed by the defendants, or granting the Decree as sought by the Government.

The Court: I think frankly that Derst has a different standing here.

Well, all you are saying then is that you have presented a proposed Decree?

Mr. Dunlap: Yes, sir.

The Court: I have asked the Government to show cause why it should not be entered. If I'm satisfied that the Government has shown cause that it should not be entered, then I should then docket the case for trial!

406 Mr. Dunlap: I think that's correct.

Mr. Stuckey: That's the way I understand it.

The Court: That's the way you understood it?

Mr. Stuckey: Yes, sir.

The Court: In other words, I was in error when I suggested that I should go ahead and enter it, either the way you wanted it or the way they wanted it?

Mr. Stuckey: Well, I think—

The Court: I think that I was in my own mind—I've seen cases before where the parties agreed to dismissal and then couldn't agree on the—

Mr. Stuckey: Form of dismissal.

The Court: —the form of dismissal, the terms of the final Order. And I thought perhaps that's the way everybody understood it was being submitted, but if this
407 is the understanding that they have come in and said, "Here we are; we want to give him all he asks for," and you object and convince me that your objection is well taken, that these proceedings are just wiped out and the case is set for trial and that you go on to trial.

Mr. Stuckey: That's been my understanding all along.

The Court: All right.

Mr. Dunlap: I don't think counsel had any different thought from that.

The Court: All right. I'm glad I brought it up.

Mr. Stuckey: I might make this point, in defense of the defendants, that if you entered the Government's Decree it certainly wouldn't be any consent in quotations by the defendants.

The Court: Well, certainly they would have a right to appeal if I—they are not consenting to what you want.

That's been their pleading.

408 Mr. Stuckey: Yes, sir.

Mr. Dunlap: I don't believe there is any motion before Your Honor to enter the Government's Decree.

The Court: I understand. I think that's clear.

I will get you, Hal, to get the Clerk to filemark this affidavit. I have marked it filed before me this day; and thirty days is Sunday, 14th of July. It will be July 15 anyway.

I'll be glad to hear from you before then.

Mr. Stuckey: All right, sir.

The Court: To get this thing done.

And thereupon the hearing was concluded.

409

(Reporter's Certificate to foregoing transcript omitted in printing.)

(File endorsement omitted)

410

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 4735-Civ-J

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WARD BAKING COMPANY, et al., *Defendants*.

Order Denying Defendants' Motion to Dismiss Count II of Complaint, etc.—June 22, 1962

This matter coming on to be heard on June 14, 1962 on the court's order to show cause dated May 8, 1962 and the Plaintiff, United States of America, having filed a written formal reply to the said order on or before June 1, 1962, along with an accompanying brief; and the Defendants on June 11, 1962 having filed a motion for leave to file an amended motion for entry of judgment, a copy of which amended motion was attached as Exhibit "A" to said motion for leave to file, and appended as exhibits to said amended motion was an amended proposed judgment as to Count II and an affidavit of H. M. Blackshear, Jr.; and at the said hearing H. M. Stuckey, attorney for the Plaintiff, United States of America, having tendered to the court for filing an affidavit of H. M. Stuckey and having moved to strike from the file the affidavit of H. M. Blackshear, Jr.; and the Defendants having tendered to the court for filing a brief in reply to the brief of the Plaintiff filed with the court on June 1, 1962; and the Defendants having stated to the court they did not desire to file a reply brief in support of their motion to dismiss Count II of the complaint and the parties having stated to the court that the Defendants' amended motion for entry of judgment could be considered by the court without further oral argument or hearing; and the court having heard the argument of counsel and having considered the same,

411 **IT IS HEREBY ORDERED:**

1. The Defendants' motion to dismiss Count II of the Plaintiff's complaint is hereby denied.

2. That the motion of Plaintiff's attorney to strike from the record and to remove from the file the affidavit of H. M. Blackshear, Jr. is hereby denied.

3. The Defendants' motion for leave to file an amended motion for entry of judgment is hereby granted and the same is hereby filed along with its accompanying exhibits.

4. That the affidavit of H. M. Stuckey tendered for filing by the Plaintiff's counsel is hereby received and filed.

5. That the brief of the Defendants tendered to the court for filing is hereby received and filed.

6. That if the Plaintiff desires to file a written reply and/or brief to the Defendants' amended motion for entry of judgment or to the brief of the Defendants filed herein, that the Plaintiff file such written reply and/or brief on or before July 15, 1962 or file with the court prior to that time a written statement that the Plaintiff does not desire to file any such written reply or brief.

DATED at Jacksonville, Florida, this June 22, 1962.

BRYAN SIMPSON

United States District Judge

(File endorsement omitted)

412

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

(Title omitted)

**Reply Brief and Statement of Government's Position Re Entry
of Defendants' Second Proposed Judgment—Filed July
18, 1962**

On May 8, 1962 the defendants in this case moved this Court for entry of a so-called consent judgment, to which the Government did not consent. On May 8, 1962, the Court entered an order directing the Government to show

cause why the defendants' motion should not be granted. On May 31, 1962, the Government filed a memorandum opposing the entry of the said judgment. On June 14, 1962, the defendants filed a memorandum in answer to the Government's opposition to the defendants' motion and at the same time the defendants filed an amended proposed judgment. The Court has given the Government this opportunity to reply to the defendants' memorandum, if it wished, and to state its position in regard to the defendants' proposed amended judgment, giving the Government until July 15, 1962, to do so.

The Government believes that if the Court were to enter the proposed judgment over the Government's objection, in the absence of any findings of fact, the Court having heard no evidence, the Court would be committing error. It is to prevent this from being done that the Government deems it desirable to reply briefly to the legal points raised in the defendants' memorandum in which they assert that the Court has a right to enter the judgment.

413

I

THE JUDGMENT CANNOT LEGALLY BE ENTERED

The defendants argue that the judgment which they propose "is a consent judgment" which, of course it is not. Nor does it "amount to" a consent judgment within the meaning of that term as used by Congress. A judgment imposed upon a party against his consent can never be deemed a consent judgment.* The defendants' analogy of a *nolo* plea in a criminal case and their contention that since the court can accept a *nolo* plea over the objection of the Government it can also accept a judgment over the Government's objection does not follow.

Nolo pleas are treated as guilty pleas for the purposes of the particular case and the defendant is given the same

* "A consent decree, as the court views it, is an agreement between the contending parties in the case, such agreement meeting with the approval of the court. That of course, cannot be appealed from. Since the Government has not and will not consent to these decrees, they cannot properly be termed consent decrees, and the court cannot force a consent decree upon one of the parties. That indeed, would be an anomalous situation." *United States v. Hartford-Empire Company*, 1 F.R.D. 424, 426-427 (N.D. Ohio).

punishment on a *nolo* plea as he would be given on a guilty plea. *A defendant, on a plea of nolo, has nothing to say as to the punishment he receives.* A defendant in a civil case who enters into a consent judgment has much, in fact everything, to say as to the relief which is obtained against him. A consent judgment is a result of bargaining between the plaintiff and the defendant. A defendant cannot enter a *nolo* plea without first withdrawing his plea of not guilty. A defendant can enter into a consent judgment and at the same time leave on the record his denial of the charge.

II

THE PROPOSED JUDGMENT DOES NOT GIVE THE GOVERNMENT ALL THE RELIEF TO WHICH IT COULD BE ENTITLED AFTER A SUCCESSFUL TRIAL

The defendants argue that their proposed amended
414 judgment gives the Government all of the relief to which the Government would be entitled even after a successful trial.** But the parties cannot predict what relief the trial may demonstrate to be essential. And after trial the record may require additional relief not now contemplated.

When the defendant in the *Hartford-Empire case*, *supra* moved for the entry of a so-called consent decree containing the injunctive provisions to which it "believed" the Government was entitled, Judge Kloeb denied the motion peremptorily saying that he would not "prejudge" the case. Among other things the complaint had a general prayer for "such other relief as may be required and deemed proper." Judge Kloeb stated that he could not "anticipate what form of relief he would deem to be wise, expedient and necessary to be entered into a decree, if it be found that some or all of substantially all of the allegations of the complaint are sustained." (P. 429)

The defendants here argue that "If the Government had admissable (sic) evidence going beyond the facts plead showing a legal need for broader relief, then it should have set this out specifically in answer to the rule nisi." But

** By implication, they took the same position in regard to the first proffered judgment which offered less relief than does the amended judgment.

the simple answer to this argument is that the Government was under no duty to reveal all of its evidence in answer to the rule nisi.

III

THE GOVERNMENT HAS THE RIGHT TO REFUSE TO CONSENT TO A JUDGMENT WHICH IT DEEMS INADEQUATE

The defendants contend that the Government has no discretion as to acceptance or refusal of the proffered judgment. This novel contention is based on the ground that since the defendants have offered what in their opinion is appropriate relief, the Government must be satisfied with it and cannot ask for more. In its complaint, the Government prayed for "such further, general, and different relief as the nature of the case may require *and the Court may deem appropriate* in the premises." The defendants have apparently misread this prayer as asking for such relief "*as the defendants may deem appropriate.*"

Defendants also contend that "In acting on the defendants' motion, the Court should treat the pleaded facts as if proved and admitted." Apparently they mean that in acting on their motion, the Court should treat the facts pleaded by the Government as proved or admitted and by doing so the Court can grant the relief which it deems appropriate, which must perforce be the same as what the defendants deem appropriate.

If the defendants are willing to admit the charge, the Government would have to be satisfied with the relief which the Court would, on the basis of the pleadings, deem appropriate, subject to its right to appeal. If the defendants are sincere in their belief that the relief which they have offered is the same as the Court would deem to be appropriate, they have nothing to fear by admitting the charge. But they cannot continue to maintain their innocence and at the same time have a judgment of their own choosing entered. In short, they cannot both eat their cake and have it.

IV

OBJECTIONS TO DEFENDANTS' PROPOSED AMENDED JUDGMENT

The Government insists on two provisions of relief to which the defendants have refused to accede. They are (1) a general injunction against conspiring to fix the price of bakery products to any third party other than the Government, and (2) an injunction against urging or suggesting to any seller of bakery products the quotation or charging of any price or other terms or conditions of sale of bakery products.

Surely this relief is not arbitrary on the basis of a complaint charging the defendants with having engaged in a price fixing conspiracy extending over at least a four year period.

416 In our May 31 memorandum we asked the question "Can it be said that the Government is unreasonable in being apprehensive that the defendants, having conspired to fix the price of bread and rolls to certain Governmental installations in a certain area, will not also attempt to fix the price of other bakery products to other Governmental installations in other areas?" In this connection we feel that the Court will find it not without significance that on June 27, 1962, a federal grand jury in Philadelphia indicted the defendant Ward Baking Company on a charge of conspiring with five other baking companies to fix the prices of "economy" bread sold in the Philadelphia-Trenton area.

We are not urging the Court to enter the judgment suggested by the Government, or attempting to argue here the merits of our judgment versus the merits of defendants' proposed judgment. We are voicing our objection to the entry of any proposed judgment without adjudication and without our consent.

CONCLUSION

It is respectfully submitted that the defendants' motion for entry of judgment against it should be denied.

Dated: July 13, 1962

ALFRED KARSTED

Attorney

Department of Justice

(File endorsement omitted)

418

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

**Order Granting Defendants' Motion for Entry of Judgment—
December 10, 1962**

This cause came on to be heard on June 14, 1962 on defendants' motion for entry of judgment and upon the plaintiff's opposition thereto. All parties were represented before the court. The situation confronting the court can be best understood by a review of the record and events in this case, and in the companion criminal anti-trust action, Criminal Action No. 11677 Crim-J.

On March 6, 1961 an indictment was returned by the Grand Jury in this district, charging that Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company had engaged in a combination and conspiracy in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act. The combination and conspiracy complained of consisted of an agreement among the defendants (1) to allocate among themselves the business of supplying bakery products to Federal Naval Installations in the Jacksonville area, which encompassed Northeast Florida and Southeastern Georgia, and (2) to submit non-competitive, collusive and rigged bids and price quotations for supplying bakery products to the Federal Naval Installations in the said Jacksonville area.

On April 10, 1961 the arraignment in the criminal action took place. All of the defendants asked leave to interpose pleas of nolo contendere. After argument before the court, the court granted such leave, accepted the defendants' pleas of nolo contendere, and imposed substantial fines on each defendant.

Thereafter, on July 21, 1961 the United States of America filed a civil complaint against the same defendants based upon the same facts as were presented in the companion criminal antitrust action No. 11677-J. In Count One of the complaint so filed in this cause, the plaintiff charged the defendants with violations of the False Claims

Act (31 U.S.C. Sects. 231-233) and requested forfeitures and double the amount of damages suffered by the plaintiff due to defendants' acts.

In Count Two of the civil complaint, the plaintiff alleged violation of Section 1 of the Sherman Act, charging the defendants with allocating among themselves the business of supplying bakery products to the United States Naval Installation in the Jacksonville area and with submitting non-competitive, collusive and rigged bids and price quotations for supplying bakery products to the United States Naval Installations in that area.

The plaintiff then asked the defendants be enjoined from

(1) Allocating among themselves the business of supplying bakery products (meaning bread and rolls) to the United States Naval Installations in the Jacksonville area, defined as the Northern part of the State of Florida and the Southeastern part of the State of Georgia, and from

(2) Submitting non-competitive, collusive and rigged bids and price quotations for supplying bakery products to the United States Naval Installations in the Jacksonville area.

The plaintiff also asked for such further, general and different relief as the nature of the case may require and the court may deem appropriate in the premises.

During the months of March and April of 1962, the defendants negotiated with the plaintiff in an effort to dispose of this civil action, on the basis of the payment of moneys sought in Count One and a consent decree 420 as to Count Two. The parties were able to agree on a monetary settlement of Count One, but were unable to agree to a form of proposed judgment to settle Count Two.

On May 8, 1962 a hearing was held by the court on all remaining issues in the case. Count One was settled by the payment by the defendants of the sum of \$44,000. At the same time the defendants filed with the court a motion for entry of judgment, attaching to said motion a proposed form of Judgment on Count Two which, if entered, would grant the specific relief against the defendants which had been requested by plaintiff in paragraph (b) of its prayer for relief. The plaintiff's attorney also tendered to the

court a proposed form of judgment on Count Two. At the conclusion of this hearing the court issued an order to show cause why defendants' motion for entry of a judgment on Count Two should not be granted and why the proposed judgment tendered therewith should not be entered. The plaintiff did not, in response to the order to show cause, file or attempt to file any amendments to the complaint relating to the facts upon which the injunctive relief was prayed for or to broaden the scope of the injunctive relief requested.

Prior to the hearing on said order to show cause, the defendants filed an amended motion for entry of judgment, which substantially expanded the scope of the judgment as originally proposed by them, and affidavits were filed by the parties. The amended proposed judgment enlarged the scope of the injunctive relief to cover sales of all types of bakery products and to expand the area of sales from sales to Naval Installations in the Jacksonville area to sales to the United States of America and its agencies or instrumentalities wherever located.

The proposed judgments as ultimately tendered to the court by the plaintiff and defendants were alike except in the following respects:

(1) The judgment proposed by defendants applied to the sale of bakery products to the United States of America, its agencies or instrumentalities. That proposed by the plaintiff applied to the sale of bakery products to third persons and was not limited to sales to the United States of America, its agencies and instrumentalities.

421 (2) The judgment proposed by the plaintiff enjoined the defendants from urging or requiring any seller of bakery products to adhere to any particular price or other terms or condition of sale for bakery products.

The court notes that the injunctive aspects of the judgment proposed by the defendants are much broader than the relief specifically requested by the plaintiff in its complaint as to the type of products involved, the geographical area covered, and the classes of customers who would be affected. The complaint as filed concerned only sales of bread and rolls to Naval Installations in the restricted Jacksonville area.

The demand of the plaintiff as to the inclusion of the two controversial provisions in its tendered judgment does not have a reasonable basis under the circumstances here present. The insistence of the plaintiff on the inclusion thereof constitutes arbitrary and unauthorized conduct in view of the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act and thus avoid a costly and protracted trial for the parties. See *Twin Ports Oil Co. v. Pure Oil Co., et al.*, (D.C.Minn. 1939), 26 F. Supp. 366; *U. S. v. Brunswick-Balke-Collender Co.*, (D.C.Wisc. 1962), 203 F. Supp. 657.

On this record the form of the proposed judgment tendered by the defendants appears to provide the plaintiff with every safeguard needful to accomplish the prevention and restraint of the violations of the Sherman Act as set forth in the complaint and grants a restraint much broader than the relief prayed for by the plaintiff. Based upon this court's knowledge of the facts involved in Case No. 11677-Crim-J and this record, the proposed judgment which the court is entering provides all the relief to which the plaintiff would be entitled after the entry of a decree pro confesso against each defendant and after a trial on the allegations of this complaint.

It appears to the court that the Department of Justice, by withholding its consent to the proffered judgment, is frustrating the clear intent of Congress to encourage early entries of injunctive decrees without long and protracted trials, and that the government is attempting to
422 place the defendants in the position of either capitulating to an arbitrary and unauthorized demand, or undergoing the ordeal of a long and costly trial.

The mere fact that a court has found a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. *N.L.R.B. v. Express Publishing Co.* 1944, 313 U.S. 246, 435-436, 61 S. Ct. 693, 699, 85 L. Ed. 930.

This court sitting as a court of equity has power to afford the defendants relief. *U. S. v. Brunswick-Balke-Collender Co.* (E.D. Wisc. 1962), 203 F. Supp. 657.

The amended motion of the defendants, Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company for entry of judgment is hereby granted.

DATED at Jacksonville, Florida this 10 day of December, 1962.

BRYAN SIMPSON
Chief Judge

— (File endorsement omitted) —

423. IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION
Civil No. 4735-Civ-J

UNITED STATES OF AMERICA, *Plaintiff,*

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY,
DERST BAKING COMPANY, FLOWERS BAKING COMPANY,
INC. and SOUTHERN BAKERIES COMPANY, *Defendants.*

Final Judgment—Count II—December 10, 1962

Plaintiff, United States of America, having filed its complaint herein in two Counts on July 21, 1961 and final judgment having been entered on Count I of the complaint and the defendants, by their respective attorneys, having filed a Motion for Entry of a Judgment along with amendments in conformity thereto with the relief sought by the plaintiff in its complaint, without trial or adjudication of any of the issues of fact or law herein and before the taking of any testimony; it is hereby

ORDERED, ADJUDGED AND DECREED upon Count II of the complaint as follows:

I.

This Court has jurisdiction of the subject matter hereof and of the parties consenting thereto and Count II of the complaint states a claim upon which relief may be granted

against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" commonly known as the Sherman Act, as amended.

424

II.

The provisions of this final judgment applicable to any defendant shall apply also to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this final judgment by personal service or otherwise.

III.

Each of the defendants is enjoined and restrained from directly or indirectly entering into, adhering to, or claiming or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other person to:

(a) Submit noncompetitive, conclusive or rigged bids, or quotations for supplying any bakery products to United States of America, its agencies or instrumentalities, or

(b) Allocate, divide or rotate the business of supplying any bakery products to United States of America, its agencies or instrumentalities.

IV.

Each defendant is enjoined and restrained from directly or indirectly disclosing to or exchanging with any seller of bakery products the intention to submit or not submit a bid or quotation for supplying bakery products to United States of America, its agencies or instrumentalities, the fact that such a bid or quotation has or has not been submitted or made, or the content or terms of any such bid or quotations.

V.

Each defendant is ordered and directed for a period of five years after the date of entry of this final judgment,

to submit a sworn statement in the form set forth in the Appendix hereto with each bid for bakery products submitted to any governmental agency of the United States of America (unless such installation requires the submission of a different type of sworn statement to the same effect), such sworn statement to be signed by the person actually responsible for the preparation of said bid.

VI.

For the purpose of securing compliance with this final judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(a) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to the supplying of bakery products to the United States of America, its agencies and instrumentalities; and

(b) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters contained in this final judgment.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendant shall submit such written reports with respect to supplying bakery products to any governmental agency of the United States of America.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this final judgment

in which the United States is a party or as otherwise required by law.

426

VII

Jurisdiction is retained for the purpose of enabling any of the parties to this final judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this final judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

DATED at Jacksonville, Florida this 10 day of December, 1962.

BRYAN SIMPSON

United States District Judge

427

APPENDIX

AFFIDAVIT

The undersigned hereby certifies to his best knowledge and belief that:

(1) The bid to
(name of recipient of bid) dated
has not been prepared by
(name of defendant) in collusion with any other seller
of bakery products, and

(2) The prices, terms or conditions of said bid have
not been communicated by the undersigned nor by any
employee or agent of
(name of defendant), to any other seller of bakery
products and will not be communicated to any such
seller prior to the official opening of said bid,

in violation of the Final Judgment in Civil No. 4735-Civ.-J
entered by the United States District Court for the South-
ern District of Florida, Jacksonville Division, on,
1962.

Dated:, 1962

(File endorsement omitted)

428

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Notice of Appeal to the Supreme Court of the United States—
Filed February 4, 1963

I

Notice is hereby given that the plaintiff, United States of America, hereby appeals to the Supreme Court of the United States from the order and judgment entered in this action on December 10, 1962. This appeal is taken pursuant to 15 U.S.C. 29.

II

The Clerk will prepare a certified transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include therein the entire record before the district court including the pleadings, transcripts of argument, and this Notice of Appeal.

III

The government's complaint charged the defendants, *inter alia*, with rigging bids and allocating business in violation of Section 1 of the Sherman Act, and sought an adjudication of the violation, an injunction against the alleged unlawful practices and "such further, general and different relief as the nature of the case may require and the Court may deem appropriate". After consent decree negotiations had reached an impasse, the defendants requested the court to enter an injunction which was narrower than the injunction proposed by the government, in that it did not contain two provisions upon which the government insisted. Before any evidence was heard, and over the government's objection, the Court entered the narrower decree tendered by the defendants.

429 The question presented by this appeal is whether the district court erred in entering the final judgment proposed by the defendants, without the government's

consent and without a trial of the issues presented by the complaint

/s/ WILLIAM P. CASSEY
Attorney for the Plaintiff

Dated: February 1, 1963

430 CERTIFICATE OF SERVICE
(omitted in printing)

431 CLERK'S CERTIFICATE
(omitted in printing)

432 SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1962
No. 993

UNITED STATES OF AMERICA, *Appellant*,

v.

WARD BAKING CO., ET AL., *Appellees*.

Stipulation for Supplemental Record—Filed April 24, 1963

It is hereby stipulated and agreed by and between the attorneys for the respective parties that the following papers and documents shall be certified and transmitted by the Clerk of the United States District Court for the Middle District of Florida to the United States Supreme Court as a supplemental record herein:

1. Notice of preliminary pretrial conference on March 22, 1962 at 10:00 A.M., filed on February 8, 1962.
2. Notice of hearing on remaining issues before Honorable Bryan Simpson on May 8, 1962, filed on April 25, 1962.
3. Form of proposed final judgment tendered and filed by the government before Judge Simpson at the hearing on May 8, 1962.

/s/ ARCHIBALD COX
Archibald Cox
Solicitor General

April 24, 1963

433

AMERICAN BAKERIES COMPANY

By /s/ CHARLES L. GOWEN
Charles L. Gowen
King & Spalding

DERST BAKING COMPANY

By /s/ JOHN B. MILLER
John B. Miller
Hitch, Miller, Beckmann & Simpson

SOUTHERN BAKERIES COMPANY

By /s/ JOHN H. BOMAN, JR.
John H. Boman, Jr.
Hansell, Post, Gardner, Brandon
& Dorsey

WARD BAKING COMPANY and FLOWERS BAKING
COMPANY, INC.

By /s/ FRED H. KENT
Fred H. Kent

By /s/ JOHN W. BALL
John W. Ball

By /s/ DAVISSEON F. DUNLAP
Davisson F. Dunlap

All members of the firm of Ulmer,
Murchison, Kent, Ashby & Ball

(File endorsement omitted)

434

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 4735 Civ-J

UNITED STATES OF AMERICA, *Plaintiff,*

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY,
DERST BAKING COMPANY, FLOWERS BAKING COMPANY,
INC. and SOUTHERN BAKERIES COMPANY, *Defendants.*

Notice of Pre-Trial Conference—Filed Feb. 8, 1962

TO—

United States Attorney,

John B. Miller, Esq., and Messrs. Hitch, Miller & Beckmann, P. O. Box 2126, Savannah, Georgia

John W. Ball, Esquire and Davisson F. Dunlap, Esquire, Florida National Bank Building, Jacksonville, Florida.

Fred H. Kent, Esquire, Davisson F. Dunlap, Esquire, and John Ball, Esquire, Florida National Bank Building, Jacksonville, Florida

W. H. Blackshear, Jr., and Messrs. Spalding, Sibley, Troutman Meadow & Smith, 434 Trust Company of Georgia Bldg., Atlanta, Georgia

Messrs. Hitch, Miller & Beckman, P. O. Box 2126, Savannah, Ga.

Messrs. Adair, Ulmer, Murchison, Kent & Ashby, Florida National Bank, Jacksonville, Florida

John H. Boman, Jr., Esquire, and Messrs. Crenshaw, Hansell Ware, Brandon & Dorsey, 310 Multon Federal Building

NOTICE that the above entitled case has been set for hearing and disposition of all pending matters and preliminary pretrial conference on March 22, 1962 at 10:00 A.M. with a view to narrowing of issues, limitation of discovery, and

other pertinent matters. Counsel should attend this hearing prepared to discuss date for final pretrial hearing and for date of trial.

BRYAN SIMPSON
Chief Judge

February 8, 1962

Clerk's Certificate to foregoing paper omitted in printing.

(File endorsement omitted)

435

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 4735-Civil-J

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY,
DERST BAKING COMPANY, FLOWERS BAKING COMPANY,
INC. and SOUTHERN BAKERIES COMPANY, *Defendants*.

Nunc Pro Tunc Order—April 12, 1963

At the hearing before this Court on May 8, 1962, which resulted in the entry of this Court's order to show cause dated May 8, 1962, as said order to show cause recites, the attorney for the plaintiff, tendered to the Court a proposed form of final judgment on count two of said complaint. Said proposed form of final judgment was not marked filed by the Court, nor by the Clerk, nor made the subject of a minute or docket entry, but was lodged in an auxiliary file in this cause entitled by the Clerk "Volume #3 Briefs & Transcript." Said form of proposed final judgment has been removed from said auxiliary file, marked Exhibit A to this order, and attached to this order by the undersigned Judge.

The form of consent judgment as to count two of the complaint proposed by the defendants at said hearing of May 8, 1962 is a part of this record as an attachment to the defendants' motion for entry of consent judgment.

(filed May 8, 1962). Both proposed forms of judgment, that is the form proposed by the plaintiff as well as the form proposed by the defendants, should properly be a part of the record of said hearing of May 8, 1962. In consideration whereof, it is

ORDERED that the attached blank form of final judgment, Exhibit A hereto, is ordered filed and docketed by the Clerk of this Court, nunc pro tunc as of May 8, 1962.

DONE AND ORDERED in Chambers, at Jacksonville, this 19th day of April, 1963.

/s/ BRYAN SIMPSON
Chief Judge

U. S. Attorney, Jacksonville, Florida

Honorable Lee Loevinger
Assistant Attorney General
Antitrust Division
Department of Justice
Washington 25, D. C.

Lionel Kestenbaum, Esquire
Assistant Chief Appellate Section
Antitrust Division
Department of Justice
Washington 25, D. C.

Davisson F. Dunlap, Esquire
850 Florida National Bank Building
Jacksonville 2, Florida

Counsel of record for defendant Ward Baking Company
for disposition to counsel of record for other defendants.

Clerk's Certificate to foregoing paper omitted in printing.

Exhibit A (Order of April 18, 1963)

437

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION****Civil No. 4735-Civ.-J****UNITED STATES OF AMERICA, *Plaintiff,*****v.****WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY,
DERST BAKING COMPANY, FLOWERS BAKING COMPANY,
INC. and SOUTHEEN BAKERIES COMPANY, *Defendants.*****FINAL JUDGMENT**

Plaintiff, United States of America, having filed its complaint herein on July 21, 1961, and the plaintiff and the defendants by their respective attorneys having severally consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein;

Now, THEREFORE, before the taking of any testimony and the defendant Derst Baking Company having heretofore been dismissed as a defendant under Count I of the complaint herein, and plaintiff and the remaining defendants having jointly moved to dismiss Count I, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

Count I of the complaint is hereby dismissed with prejudice.

II

This Court has jurisdiction of the subject matter hereof, and of the parties consenting hereto, and the complaint states a claim under Count II which relief may be granted against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect
438 trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

III

The provisions of this Final Judgment applicable to any defendant shall apply also to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

Each of the defendants is enjoined and restrained from directly or indirectly entering into, adhering to, or claiming or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other person to:

(A) Establish, maintain, stabilize or fix prices or other terms or condition for sale of any bakery products to any third person;

(B) Submit noncompetitive, collusive or rigged bids, or quotations for the sale of bakery products; or

(C) Allocate, divide or rotate customers for the sale of bakery products.

V

Each defendant is enjoined and restrained from directly or indirectly:

(A) Urging or requiring any seller of bakery products to adhere to any particular price or other term or condition of sale for bakery products; or

(B) Disclosing to or exchanging with any seller of bakery products the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation.

VI

Each defendant is ordered and directed for five (5) years from the date of entry of this Final Judgment to submit a sworn statement in the form set forth in the

Appendix hereto with each bid for bakery products submitted to any governmental agency (unless such agency requires the submission of a different type of sworn statement to the same effect), such sworn statement to be signed by the person actually responsible for the preparation of said bid, and the person supervising such person, such as the plant manager.

VII

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendant shall submit such written reports with respect to any of the matters contained in 440 this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

VIII

Jurisdiction is retained for the purpose of enabling any of the parties consenting to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

Dated:....., 1962

.....
United States District Judge

441

APPENDIX

AFFIDAVIT

The undersigned hereby certify to their best knowledge and belief that:

(1) The bid to
(name of recipient of bid) dated
has not been prepared by
(name of defendant) in collusion with any other seller
of bakery products, and

(2) The prices, terms or conditions of said bid have
not been communicated by the undersigned nor by any
employee or agent of
(name of defendant), to any other seller of bakery
products and will not be communicated to any such
seller prior to the official opening of said bid,

in violation of the Final Judgment in Civil No. 4735-Civ.-J
entered by the United States District Court for the South-
ern District of Florida, Jacksonville Division, on
1962.

Dated:

.....
Signature of person responsible
for the preparation of the bid

.....
Signature of person supervising
the above person.

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SUPREME COURT OF THE UNITED STATES

No. 993, October Term, 1962

UNITED STATES, *Appellant*,

v.

WARD BAKING CO., ET AL.

APPEAL from the United States District Court for the
Middle District of Florida.

Order Noting Probable Jurisdiction—June 10, 1963

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.